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N. 2941

No. 14795

United States
Court of Appeals
for the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Appellant,
vs.
ERNEST EVERETT, Appellee.

Transcript of Record
In Two Volumes

VOLUME I.
(Pages 1 to 282, inclusive)

Appeal from the United States District Court for the Eastern
District of Washington, Northern Division

FILED

DEC - 1 1955

PAUL P. O'BRIEN, CLERK

No. 14795

United States
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for the Ninth Circuit

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In the United States District Court for the Eastern
District of Washington, Northern Division

No. 1197

ERNEST EVERETT, Plaintiff,

VS.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, and F. W. SCOBEE,
Defendants.

COMPLAINT

Plaintiff alleges:

I.

That plaintiff is the father of Erna Mae Everett, deceased, and that the said Erna Mae Everett, deceased, was, at the time of her death, of the age of sixteen years and resided with and was a member of the household of said plaintiff and his wife; that until receiving the injuries hereinafter described, said Erna Mae Everett, deceased, was in good physical and mental health.

II.

That the defendant, Northern Pacific Railway Company, now is and at all times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and as such operates lines of railroad in the State of Minnesota, and other states, and in the State of Washington, hauling freight and passengers thereon as a common carrier for hire.

III.

That in the matters herein alleged, defendant, F. W. Scobee, acted as agent and employee of the defendant, Northern Pacific Railway Company, and defendant, F. W. Scobee, was the engineer of the train hereinafter mentioned, and in the matters hereinafter alleged, defendant, F. W. Scobee, acted wholly within the scope of his employment and authority as agent of the defendant, Northern Pacific Railway Company.

IV.

That at all times herein mentioned, defendant, Northern Pacific Railroad Company, owned, controlled, maintained and operated a railroad in the vicinity of the City of Ellensburg in Kittitas County, State of Washington; that in said vicinity and within said Kittitas County, a portion of said railway of said Northern Pacific Railway Company's track and right-of-way extend in a general easterly and westerly direction and intersects by way of a public crossing likewise owned, controlled and maintained by said defendant company, O'Neill Road, which is a roadway and thoroughfare extending in a general northerly and southerly direction.

V.

That on or about the 8th day of March, 1952, at about the hour of 2:50 p.m. on said day, Erna Mae Everett was operating a 1938 Dodge panel truck owned by the plaintiff herein, in a general northerly direction along said O'Neill Road; that as Erna Mae Everett attempted to use said public crossing to

cross over said right-of-way and track, said panel truck she was driving stalled squarely on the defendant company's railroad tracks; that at the same time and place defendants were operating a passenger train in a general westerly direction over and along said railroad track and at said time and place defendants ran said passenger train into and against the panel truck Erna Mae Everett was operating as aforesaid, whereby the said Erna Mae Everett was violently crushed and injured and shortly thereafter the said Erna Mae Everett died from the injuries so received.

VI.

That the collision, the death of Erna Mae Everett, and the ensuing damage to plaintiff as set out herein, were directly and proximately caused by negligence on the part of the defendants in one or more of the following particulars:

(a) Defendants drove said train in a negligent, careless and reckless manner and at a speed between 70 and 80 miles per hour, which speed was excessive and dangerous to persons using said crossing at the time, place and under the conditions then existing;

(b) Defendants failed and neglected to provide and maintain any signal, by mechanical device or otherwise, for the purpose of warning Erna Mae Everett and others of the approach of said passenger train;

(c) Defendants failed and neglected to cause a watchman or other person to be stationed at said crossing for the purpose of warning Erna Mae

Everett and others of the approach of said passenger train;

(d) Defendants neglected and failed to sound the crossing signals required by the statutes of the State of Washington as the locomotive approached the said crossing, by either blowing a whistle or sounding a bell of said locomotive;

(e) Defendants negligently failed to stop said train, slacken its speed or give timely or adequate warning of its approach to said crossing when the persons operating the said train saw, or, by the exercise of ordinary care, would have seen, Erna Mae Everett and plaintiff's panel truck in a position of imminent peril of being struck by the said train;

(f) Defendants negligently maintained said crossing area and right-of-way by failing to cut the natural growth, underbrush and vegetation on its right-of-way near said crossing, with the result that said natural growth of underbrush and vegetation obstructed the view of defendant railway company's tracks from persons driving upon O'Neill Road and approaching said crossing from the southerly direction;

(g) Defendants negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to said crossing and immediately next to the wooden planking at said crossing.

VII.

That the collision and Erna Mae Everett's death were further caused by and due to wanton miscon-

duct on the part of the defendants in the operation of the aforesaid passenger train and in the maintenance of the aforesaid crossing, in one or more of the following particulars:

(a) The defendant's servants on said train intentionally, and with a reckless indifference to injurious consequences probable to result therefrom, drove said train at a speed between 70 and 80 miles per hour, which speed was greatly excessive and dangerous to persons using said crossing at the time and place under the conditions then existing;

(b) Defendant's servants operating said train, saw, or should have seen, that an unusually dangerous situation existed when plaintiff's vehicle, operated by Erna Mae Everett, stalled on said railroad track and said Erna Mae Everett was attempting to abandon and flee said vehicle. Yet, knowing that a failure to warn Erna Mae Everett would probably result in serious injury, the defendants proceeded to run said train into said intersection and against plaintiff's said vehicle without previously giving any signal or warning by blowing the whistle or ringing the bell of the locomotive, or giving warning by way of any other device of any kind whatsoever;

(c) Defendants saw, or should have seen, that a collision with Erna Mae Everett was imminent and had the opportunity to realize and appreciate her danger, but the defendants, with reckless indifference to injurious consequences probable to result therefrom, failed to reduce the speed of said passenger train by applying full and sufficient braking

power to the wheels of said locomotive and the cars following it;

(d) Defendants wantonly maintained the said crossing in a dangerous condition in that at said time and place the rock and cinder ballast leading up to said railroad crossing and next to the wooden planking at said crossing had been worn or carried away causing the wooden planking to protrude like a barrier above the roadway in an unusual and hazardous manner, and as a result of the foregoing dangerous conditions, plaintiff's vehicle became stalled on said crossing in the path of defendant's train.

VIII.

That plaintiff's automobile was completely demolished by said collision and was then and there of the reasonable value of \$500.00.

IX.

That plaintiff has incurred expense or indebtedness for the funeral and burial of the said Erna Mae Everett the sum of \$832.76.

X.

That the aforesaid acts and conduct of the defendants, and each of them, were the proximate cause of the death of plaintiff's daughter, Erna Mae Everett, and the resultant damage herein complained of.

XI.

That by reason of the premises, plaintiff has suffered special damages for the demolition of his auto-

mobile in the sum of \$500.00; and has further suffered special damages in the sum of \$832.76 for the funeral and burial of said daughter, and has suffered general damages for the death of his daughter in the sum of \$30,000.00.

Wherefore, plaintiff prays that he recover judgment against the defendants, and each of them, for the sum of \$30,000.00 general damages, and for the further sum of \$1332.76 special damages, or for a total sum of \$31,332.76, and for plaintiff's costs and disbursements herein incurred.

/s/ R. MAX ETTER

/s/ ELLSWORTH I. CONNELLY,

Attorneys for Plaintiff

[Endorsed]: Filed July 28, 1954.

[Title of District Court and Cause.]

ANSWER

Come now the defendants above named and for their answer to plaintiff's complaint admit, deny and allege as follows:

I.

Admit paragraph I of said complaint.

II.

Admit paragraph II of said complaint except that defendant, Northern Pacific Railway Company, alleges that it is a Wisconsin corporation and not a Minnesota corporation as alleged in said paragraph.

III.

Admit paragraph III of said complaint.

IV.

Admit paragraph IV of said complaint.

V.

Admit paragraph V of said complaint.

VI.

Answering paragraph VI of said complaint, defendants deny each and every matter and thing therein contained.

VII.

Answering paragraph VII of said complaint, defendants deny each and every matter and thing therein contained.

VIII.

Answering paragraph VIII of said complaint, defendants have no knowledge or information sufficient to form a belief as to the matters and things therein contained and therefore deny the same. Defendants further specifically deny that as the result of any negligent act on the part of said defendants, or either of them, the plaintiff was damaged in the sum of \$500.00 or any sum whatsoever.

IX.

Answering paragraph IX of said complaint, defendants have no knowledge or information sufficient to form a belief as to the matters and things therein contained and therefore deny the same. De-

fendants further specifically deny that as the result of any negligent act on the part of said defendants, or either of them, the plaintiff was damaged in the sum of \$731.10 or any sum whatsoever.

X.

Answering paragraph X of said complaint, defendants deny each and every matter and thing therein contained.

XI.

Answering paragraph XI of said complaint, defendants specifically deny that as the result of any negligent act on the part of said defendants, or either of them, the plaintiff has suffered special damages in the sum of \$500.00 or any sum whatsoever, special damages in the sum of \$731.10 or any sum whatsoever, or general damages in the sum of \$30,000.00 or any sum whatsoever.

Further answering said complaint and by way of an affirmative defense thereto defendants allege as follows:

I.

That the death of the said Erna Mae Everett was caused and brought about solely and alone through her own negligence, which negligence was a direct and proximate cause of the collision which resulted in her death.

II.

That the death of the said Erna Mae Everett and any and all damages, general or special, alleged to have been sustained by plaintiff as the result of said

collision were caused and brought about by the negligence of the said plaintiff, which negligence was a direct and proximate cause thereof.

Wherefore, defendants, having fully answered herein, pray that this action be dismissed and that they have and recover their costs necessarily expended herein.

/s/ F. J. McKEVITT,
Attorney for Defendants

Acknowledgment of Service attached.

[Endorsed]: Filed August 24, 1954.

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff and for Reply to the Answer of the defendants herein, states as follows:

I.

Plaintiff denies each and every allegation contained in Paragraphs I and II of Defendants' Answer and Affirmative Defenses, and plaintiff denies each and every allegation of whatsoever kind alleged in said Answer which controverts plaintiff's Complaint, or is in any manner inconsistent therewith.

Wherefore, plaintiff having fully replied to defendants' Answer prays that judgment be entered

in accord with his Complaint and that the Answer of defendants be dismissed and held for naught.

/s/ R. MAX ETTER,
/s/ ELLSWORTH I. CONNELLY,
Attorneys for Plaintiff

Jury trial of the above issues is hereby demanded.

/s/ R. MAX ETTER,
Of Counsel for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause.]

Defendants' Requested Instruction No. 8

I instruct you that under the laws of the State of Washington in force at the time of this accident it was unlawful for a person to cause or knowingly permit his child under the age of eighteen years to operate a motor vehicle upon a public highway as a vehicle operator unless such child has first obtained a vehicle operator's license. Said law further provides that no person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be operated by any person who is not legally licensed as an operator.

If you find from the evidence in this case that Erna Mae Everett at the time in question did not have a vehicle operator's license and that the plain-

tiff herein knew that she did not have such license, and if you find that said plaintiff authorized or knowingly permitted his daughter to operate the vehicle in question, then I instruct you that the plaintiff violated the law above referred to and was guilty of negligence. If you further find that such negligence was the direct and proximate cause of his daughter's death then your verdict should be for the defendant.

Rev. Code of Wash., 46.20.230—R.R.S. 6312-62.

[Endorsed]: Filed January 19, 1955.

[Title of District Court and Cause.]

Defendants' Instruction No. 10

Plaintiff has invoked in this case what is known in the Law as the last clear chance doctrine. I instruct you that you are not here concerned with a last possible chance on the part of the Railway Company to have avoided this collision. A clear chance to avoid a collision involves the element of sufficient time on the part of the engineer operating defendant's train to have appreciated the peril of the driver of the truck and to take the necessary steps to have avoided injuring the driver thereof. In other words, last clear chance implies thought, appreciation and mental direction on the part of the engineer and the lapse of sufficient time to effectively act upon the impulse to have avoided the collision. The doctrine of last clear chance does not mean a splitting of seconds when injuries arise. The words

mean exactly as they indicate, last clear chance, not possible chance.

I therefore instruct that if you find from the evidence of this case that after the engineer was first able to discover the peril of the driver of the truck he was unable to bring his train to a complete stop or to have slackened its speed for a sufficient interval of time in order to permit the driver to escape, then your verdict should be for the defendant.

[Endorsed]: Filed January 20, 1955.

[Title of District Court and Cause.]

VERDICT

We, the jury in the above entitled cause, find for the Plaintiff in the sum of \$8,632.76.

/s/ WILLIAM W. FYFE,
Foreman

[Endorsed]: Filed January 20, 1955.

[Title of District Court and Cause.]

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable Sam M. Driver, presiding, with all parties appearing by counsel and the issues having been duly tried, and the jury, on the 20th day of January, 1955, having rendered a verdict for

the [plaintiff to recover of the defendant damages in the amount of \$8,632.76].

It is ordered and adjudged that the [plaintiff recover of the defendant the sum of \$8,632.76 and his costs of action.]

Dated at Spokane, Washington, this 21st day of January, 1955.

/s/ STANLEY D. TAYLOR,
Clerk

[Endorsed]: Filed January 21, 1955.

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND
JUDGMENT ENTERED THEREON OR IN
THE ALTERNATIVE FOR A NEW TRIAL

Comes now the defendant above named and moves the Court for an order setting aside the verdict of the jury returned in said cause on the 20th day of January, 1955, and the judgment entered thereon on the 21st day of January, 1955.

This motion is made in accordance with the motion for directed verdict made by defendant at the close of plaintiff's evidence, which motion was renewed by defendant at the close of all the evidence.

In the event the foregoing motion is denied, and not otherwise, then the defendant moves the Court for a new trial upon the following grounds, to-wit:

I.

The verdict and judgment are contrary to law.

II.

The verdict and judgment are contrary to the evidence and against the weight of the evidence.

III.

There was no substantial evidence that the defendant was guilty of negligence, which negligence was the proximate cause of the death of plaintiff's daughter.

IV.

The evidence conclusively shows that a proximate cause of decedent's death was her own negligence.

V.

The evidence conclusively shows that a proximate cause of decedent's death was the negligence of plaintiff.

VI.

The Court erred in denying defendant's motion to direct a verdict in its favor at the close of plaintiff's case.

VII.

The Court erred in denying defendant's motion to direct a verdict in its favor at the close of all the evidence.

VIII.

The Court erred in withdrawing from jury consideration the negligence of the plaintiff which had been pleaded as one of its affirmative defenses.

IX.

There is no sufficient or substantial evidence tending to support the amount of the jury's verdict.

X.

The verdict is excessive and appears to have been given under the influence of passion and prejudice.

XI.

The Court erred in failing to give Defendant's Requested Instruction No. 8 or an instruction substantially similar thereto:

“Defendant's Requested Instruction No. 8:

I instruct you that under the laws of the State of Washington in force at the time of this accident it was unlawful for a person to cause or knowingly permit his child under the age of eighteen years to operate a motor vehicle upon a public highway as a vehicle operator unless such child has first obtained a vehicle operator's license. Said law further provides that no person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be operated by any person who is not legally licensed as an operator. If you find from the evidence in this case that Erna Mae Everett at the time in question did not have a vehicle operator's license and that the plaintiff herein knew that she did not have such license, and if you find that said plaintiff authorized or knowingly permitted his daughter to operate the vehicle in question, then I instruct you that the plaintiff violated the law above referred to and was guilty of negligence. If

you further find that such negligence was the direct and proximate cause of his daughter's death then your verdict should be for the defendant."

XII.

The Court erred in failing to give that portion of Defendant's Requested Instruction No. 3, or an instruction substantially similar thereto, which portion of said instruction reads as follows:

"The operators of the train had a right to assume, until the contrary appeared, that the occupant of such automobile, exercising reasonable care for her own safety, would give the train the right of way to which it was entitled under the law, and the operators of said train were not required to take any action intended to slow the speed of the train until they were aware that the said vehicle did not intend to give the train the superior right of way."

XIII.

The Court erred in failing to give Defendant's Requested Instruction No. 7, or an instruction substantially similar thereto, which instruction reads as follows:

"Defendant's Requested Instruction No. 7.

"I instruct you that if the deceased in the operation of her automobile knew of the approach of the defendant's train, and could have stopped short of the tracks and thus avoided the accident, but rather attempted to beat the train across the track, that such action was negligence on her part. If you find from the evidence that the deceased died as the

result of attempting to beat the defendant's train across said track then your verdict should be for the defendant."

XIV.

The Court erred in instructing the jury as follows:

"You are instructed that it is the law of the State of Washington that every engineer driving a locomotive on any railway who fails to ring the bell or sound the whistle upon such locomotive or cause the same to be rung or sounded at least 80 rods from any place where such railway crosses a traveled road or street on the same level, except in cities, or to continue ringing of such bell or sounding of such whistle until such locomotive has crossed such road or street, shall be guilty of a misdemeanor. Therefore, if you find from the evidence in this case that the engineer of defendant's railroad train, F. W. Scobee, failed to ring the bell or sound the whistle upon defendant's locomotive at least 80 rods east of the O'Neill crossing, and failed to continue the ringing of such bell or the sounding of such whistle until the locomotive had crossed O'Neill Road, such failure would be negligence on the part of the defendant herein, and if such negligence proximately caused the death of Erna Mae Everett, it would entitle the plaintiff to a verdict in his favor, in the absence of contributory negligence on the part of Erna Mae Everett. You will be instructed on the various aspects of contributory negligence later on, and I have given you some instructions heretofore in these instructions."

The evidence of plaintiff himself discloses that

ample warning of the approach of the train by whistle signal was given to the deceased girl when the train was at least 685 feet from the crossing and traveling at a rate of speed of 50 to 60 miles per hour.

XV.

The Court erred in instructing the jury as follows:

“Now there is involved in this case what is known as the doctrine of last clear chance. It is permissible to use the doctrine only after you find, and you may not use it unless and until you first find, that in the events leading up to the accident in question, both the deceased and the defendant were negligent.

The doctrine of last clear chance is divided into two phases to cover two separate possibilities: (1) that where the defendant actually saw the peril of the traveler on the highway and should have appreciated the danger and failed to exercise reasonable care to avoid injury, such failure made the defendant liable, although the traveler's negligence may have continued up to the instant of the injury; and (2) that where the defendant did not actually see the peril of the traveler, but by keeping a reasonably careful lookout commensurate with the dangerous character of the agency and the locality should have seen the peril and appreciated it in time by the exercise of reasonable care to have avoided the injury, and failure to escape the injury results from failure to keep that lookout and exercise that care, the defendant was liable only when the traveler's negligence had terminated or eliminated or culminated in a situation of peril from

which the traveler could not by the exercise of reasonable care extricate himself.

Therefore, if either of the two conditions just mentioned are found by you to have existed with respect to the collision in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injuries suffered by the plaintiff, that is, on account of the death of Erna Mae Everett in this case, and proximately resulting from the accident, despite the negligence of the deceased."

The basis for claim of error in this regard is:

(1) No evidence of a substantial or probative character was introduced by plaintiff which would justify the submission to the jury of the doctrine of last clear chance.

(2) Plaintiff introduced no evidence of an expert character to the effect that after the peril of the deceased was discovered the train could have been brought to a stop short of the crossing or its speed slackened to such an extent as to have enabled the deceased to have saved herself.

(3) Under the decisions of the Supreme Court of the State of Washington the question of whether or not the last clear chance doctrine can be invoked is one of law to be determined by the Court as such. Since in this state there are two branches to that doctrine it was the duty of the Court to determine which branch applied to the instant case and not to have left that question to the jury.

XVI.

The Court erred in instructing the jury as follows:

“Gentlemen of the jury, I overlooked one claim of negligence here of the plaintiff, and on that point I instruct you that if you find from the preponderance of the evidence that the defendant railway company negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking at the crossing, and you find that that negligence was the proximate cause of the death of Erna Mae Everett, and you further find it appears that there was no contributory negligent on the part of Erna Mae Everett, then your verdict should be on that point for the plaintiff.”

The basis for this claim of error is as follows:

(1) Since the Court withdrew from the jury's consideration all of the allegations of paragraph VII of the complaint, the planking condition of the crossing was not an issue.

(2) Assuming that it was an issue, there is no evidence that this planking condition was a proximate cause of this truck stalling on the crossing.

(3) There was no evidence from which the jury could infer that the approach to the crossing or the planking condition thereof was a proximate cause of the collision.

XVII.

The Court erred in denying defendant's motion to withdraw from jury consideration subdivision

(g) of paragraph VI of the complaint reading as follows:

“Defendants negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to said crossing and immediately next to the wooden planking at said crossing.”

This motion should have been granted for the reason that there was no evidence or reasonable inference therefrom that the alleged condition of the immediate approach to the crossing was a proximate cause of the truck stalling on said crossing.

XVIII.

The Court erred in denying defendant's motion to withdraw from jury consideration subdivision (d) of paragraph 6 reading as follows:

“Defendant neglected and failed to sound the crossing signals required by the statutes of the State of Washington as the locomotive approached the said crossing, by either blowing a whistle or sounding a bell of said locomotive.”

The evidence of plaintiff disclosed that whistle signals were given at a point at least 685 feet from the crossing. If, as plaintiff contends, the truck was stalled on the crossing when the Diesel engine was 685 feet distant therefrom, said signals were ample warnings of the train's approach.

If, as plaintiff's testimony disclosed, the train was traveling at 50 miles per hour, it would cover 73.33 feet in one second of time. This would have given the deceased approximately $9\frac{1}{3}$ seconds to

have left the truck and gotten into a position of safety.

If, as plaintiff's evidence disclosed, the train was traveling at 60 miles per hour, it would cover 88 feet in one second of time. This would have given the deceased approximately $7\frac{2}{3}$ seconds within which to have left the truck and gotten into a position of safety.

XIX.

The Court erred in refusing to permit defendant to prove under cross-examination of the plaintiff that on and prior to March 8th, 1952, the deceased, Erna Mae Everett, did not have an operator's license to operate a motor vehicle upon a public highway in the state of Washington.

XX.

The Court erred in sustaining the objection of plaintiff's counsel to defendant's offer to prove that on and prior to March 8th, 1952, the deceased Erna Mae Everett, did not have an operator's license to operate a motor vehicle upon a public highway in the state of Washington.

McKEVITT, SNYDER & THOMAS

/s/ By F. J. McKEVITT,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 28, 1955.

ERNEST EVERETT, Plaintiff,
 vs.

ORDER DENYING DEFENDANT'S MOTION
TO SET ASIDE VERDICT AND JUDG-
MENT ENTERED THEREON OR IN THE
ALTERNATIVE FOR A NEW TRIAL

Now, therefore, the Court having heard the argument of counsel for both defendant and plaintiff, and having considered the authorities and argument submitted by said counsel, and having reviewed and examined the records, notes and files of the proceeding, and having considered all of the above, and all of the matters appertaining to said cause;

Now, therefore, on the Motion of Defendant to Set Aside Verdict and Judgment entered thereon, or in the alternative for a New Trial,

It is ordered that said Motions, and each of them, be, and the same are, denied. Exception allowed.

Done this 17th day of March, 1955.

/s/ SAM M. DRIVER,

Judge

Presented and submitted by

/s/ R. MAX ETTER

Approved as to form:

McKEVITT, SNYDER and THOMAS,

/s/ By F. J. McKEVITT

[Endorsed]: Filed March 17, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Northern Pacific Railway Company, a corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on January 21, 1955, and filed of record in the above entitled court on said date and from each and every part thereof.

Notice is also given that the Northern Pacific Railway Company, a corporation, appeals to said court from that certain order entered in the above

entitled court on March 17, 1955, denying the motion of defendant Northern Pacific Railway Company, a corporation, to set aside the verdict returned in said action and the judgment entered thereon, or, in the alternative, for a new trial, and from each and every part of said order.

Dated this 11th day of April, 1955.

McKEVITT, SNYDER & THOMAS

/s/ By F. J. McKEVITT,
Attorneys for Defendant.

[Endorsed]: Filed April 12, 1955.

[Title of District Court and Cause.]

BOND ON APPEAL

Know all men by these presents that the Northern Pacific Railway Company, a corporation, as principal, and Saint Paul Mercury Indemnity Company, Saint Paul, Minnesota, a corporation, organized under the laws of the State of Delaware and authorized to transact the business of Surety in the State of Washington, as Surety, are held and firmly bound unto Ernest Everett, plaintiff in the above entitled action in the full and just sum of Five Hundred Dollars (\$500.00), to be paid to the said Ernest Everett, his executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 11th day of April, 1955.

Whereas, lately at the District Court of the United States, for the Eastern District of Washington, Northern Division, in a suit depending in said Court between Ernest Everett, plaintiff, and the Northern Pacific Railway Company, a corporation, a judgment was rendered against the said defendant Northern Pacific Railway Company, a corporation, in the sum of Eight Thousand Six Hundred Thirty-two and 76/100 Dollars (\$8632.76) and his costs of action, and the said defendant Northern Pacific Railway Company, a corporation, having filed in said Court a Notice of Appeal to reverse the judgment in the aforesaid suit on appeal to the United States Court of Appeals for the Ninth Circuit at a session of said Court to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such that if the said Northern Pacific Railway Company, a corporation, shall prosecute said appeal and secure to the plaintiff the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; else to remain in full force and effect.

NORTHERN PACIFIC RAILWAY
COMPANY, a corporation,

McKEVITT, SNYDER & THOMAS

/s/ By F. J. McKEVITT,
Its Attorneys

SAINT PAUL MERCURY
INDEMNITY COMPANY,
St. Paul, Minnesota,

/s/ By J. L. COX,
Attorney in Fact

[Endorsed]: Filed April 12, 1955.

[Title of District Court and Cause.]

ORDER

It appearing to the court that a Notice of Appeal was filed in the above entitled cause by the defendant (Appellant) on April 11, 1955, and upon oral motion of counsel for the defendant (appellant) it is hereby

Ordered that the time to file and docket the record on appeal in the above entitled cause in the United States Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 27th day of June, 1955.

Dated this 5th day of May, 1955.

/s/ SAM M. DRIVER,
United States District Judge

[Endorsed]: Filed May 5, 1955.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant hereby designates that the record on appeal of this cause to the United States Court of Appeals for the Ninth Circuit shall contain the record of the proceedings in the above entitled court as hereinafter particularly designated:

1. Complaint.
2. Answer.
3. Defendant's requested instruction No. 8.
4. Defendant's requested instruction No. 10.
5. Verdict for the plaintiff.
6. Judgment on verdict.
7. Court's instructions to jury.
8. Motion to set aside verdict and judgment entered thereon or, in the alternative, for a new trial.
9. Order denying motion to set aside verdict and judgment entered thereon, or, in the alternative, for a new trial.
10. Notice of appeal.
11. Cost bond on appeal.
12. Official court reporter's transcript of record (3 volumes) except (a) Opening statement of plaintiff's counsel (Volume 1, page 5). (b) Excerpts of argument of plaintiff's counsel (Volume 3, page 606).
13. Originals of all exhibits introduced in evidence in the trial of this cause.
14. This designation.

Dated this 29th day of April, 1955.

McKEVITT, SNYDER & THOMAS

/s/ By F. J. McKEVITT,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed May 3, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION
OF RECORD

As a supplemental designation of contents of record on appeal appellant designates the following:

Order of Court entered on the 5th day of May, 1955, extending the time of filing and docketing the record on appeal in the above entitled cause to the United States Court of Appeals for the Ninth Circuit to the 27th day of June, 1955.

Dated this 16th day of May, 1955.

McKEVITT, SNYDER & THOMAS

/s/ By F. J. McKEVITT,
Attorneys for Appellant

[Endorsed]: Filed May 16, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals on file in the above entitled cause:

Title of Document.

Complaint.

Answer.

Reply.

Court Reporter's Transcript of Record (Three Volumes—separately bound.)

Exhibits: Defendant's 1, Chart, scene of accident (Enclosed herewith but not attached hereto.)

Plaintiff's 2, Photograph; Plaintiff's 3, Photograph; Plaintiff's 4, Photograph; Plaintiff's 5, Photograph; Plaintiff's 6, Photograph; Plaintiff's 7, Photograph; Plaintiff's 8, Photograph; Plaintiff's 9, Photograph; Plaintiff's 10, Photograph.

Plaintiff's 11, Photograph; Plaintiff's 12, Photograph; Plaintiff's 13, Photograph; Plaintiff's 14, Receipt for funeral expenses; Plaintiff's 15, Receipt for grave marker; Plaintiff's 16, Check for cemetery plot.

Defendant's 17, Photo of crossing; Defendant's 18, Photo of crossing; Defendant's 19, Photograph; Defendant's 20, Photograph; Defendant's 21, Pho-

tograph; Defendant's 22, Photograph; Defendant's 23, Photograph; Defendant's 24, Photograph; Defendant's 25, Photograph.

Defendant's 26, Photograph; Defendant's 27, Photograph; Defendant's 28, Photograph; Defendant's 29, Photograph; Defendant's 30, Photograph; Defendant's 31, Photograph; Defendant's 32, Statement of Lee Klocke.

Plaintiff's 33, Newspaper picture.

Defendant's 34, Blue print of diesel locomotive; Defendant's 35, Blue print of cars; Defendant's 36, Speed Tape.

Defendant's Requested Instruction No. 8.

Defendant's Requested Instruction No. 10.

Court's Instruction to Jury (In Court Reporter's Record.)

Verdict for Plaintiff.

Judgment on Jury Verdict.

Motion to set aside verdict and judgment entered thereon or in the alternative for a new trial.

Order denying defendant's motion to set aside verdict and judgment entered thereon or in the alternative for a new trial.

Notice of Appeal.

Cost Bond on Appeal.

Order extending time to docket appeal.

Designation of Contents of Record on Appeal.

Supplemental Designation of Contents of Record on Appeal, and that the same constitute the record for hearing of the appeal from the judgment of the United States District Court for the Eastern District of Washington, in the United States Court of

Appeals for the Ninth Circuit, as set forth in the Appellant's Designation of Record and Supplemental Designation of Record.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District, this 22nd day of June, A.D. 1955.

[Seal] STANLEY D. TAYLOR,
Clerk, U. S. District Court, Eastern District of
Washington.

In the District Court of the United States, Eastern
District of Washington, Northern Division

Civil No. 1197

ERNEST EVERETT, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Defendant.

RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered that the above-entitled cause came on for trial at Spokane, Washington, on Monday, the 17th day of January, 1955, before the Honorable Sam M. Driver, Judge of the said Court, and a jury; the plaintiff being represented by R. Max Etter, and Ellsworth I. Connelly, his attorneys; the defendant being represented by Francis J. McKevitt and Joseph L. Thomas, appearing for McKevitt, Snyder & Thomas, its attorneys;

Whereupon, the following proceedings were had, to-wit: [16*]

The Court: Everett against Northern Pacific Railway Company.

Mr. Etter: Plaintiff is ready, your Honor.

Mr. McKevitt: Defendant is ready, your Honor.

(Whereupon, a jury was duly impaneled and sworn to try the instant cause, after which the following proceedings were had:)

The Court: I will ask counsel to step up to the bench for just a moment, please.

(Whereupon, the following proceedings were had in the presence, but out of the hearing of the jury:)

The Court: Rather than impanel an alternate here, I wonder if counsel are willing to stipulate if one of the jurors becomes incapacitated from serving for any reason which the Court deems sufficient, I may excuse him and the remaining 11 decide the case?

Mr. Etter: That is so stipulated by the plaintiff.

Mr. McKevitt: Yes, sir.

The Court: Do you want a unanimous verdict, or both of you or either of you?

Mr. McKevitt: I do, your Honor. [17]

Mr. Etter: Doesn't make any difference.

The Court: Well, it will have to be unanimous unless stipulated otherwise.

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

Mr. McKevitt: I am agreeable if two got off, agree on a minimum of 10.

The Court: It is not likely, but it is possible that two might become ill.

Mr. Etter: All right, agree on a minimum of 10.

The Court: All right. Is there anything else at this stage?

Mr. McKevitt: None.

Mr. Etter: The only thing that we might do, after our statement of our proof, as we have done before, Mr. McKevitt has a diagram——

Mr. McKevitt: I have some pictures.

Mr. Etter: We can put our pictures in.

The Court: You want to use your map in your opening statement?

Mr. Etter: I would like to. We can open the case and have your man on to explain it.

Mr. McKevitt: Yes, he is here, the engineer.

Mr. Etter: As far as the map is concerned.

Mr. McKevitt: We have witnesses who can furnish you with that.

The Court: All right. [18]

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: Now, the remainder of the jury panel, those who have not been selected on this jury, will be excused until next Monday morning at 10 o'clock.

I might say that some of the cases that have been set here have been settled, as very often happens, so I will not need any other jurors for a week. But

I will repeat that, in order that there may be no misunderstanding, you won't receive any notice, you will just have to rely on your memory, so be sure to remember to report back here, all of the rest of you who have not been selected on this jury, report back here for duty at 10 o'clock next Monday morning, January the 24th, isn't it?

The Clerk: Yes, your Honor.

The Court: If I said 17th, I misspoke here, this is the 17th. You are to report back Monday morning, January the 24th, at 10 o'clock.

I think I will take a 10 minute recess at this point.

(Whereupon, a short recess was taken.)

The Court: All right, you may proceed. [19]

The evidence likewise will show, ladies and gentlemen, will show that within ten days after this accident occurred—I want to mention these things—there was a crew came out and ballasted the approach to this particular roadway; that it was re-ballasted approximately ten days afterward. Likewise, some ten days after, the brush had been cut down in appreciable amounts along the right of way of the track, particularly on the approach from the Everett side of the track.

And that, I think, is the extent of the proof which the plaintiff intends to show here to you.

Mr. McKevitt: Reserve my statement, if your Honor please.

The Court: All right. It is too late to start calling witnesses now, so the Court will recess until 1:30.

Now, gentlemen of the jury, it is essential that you keep an open mind in this case, as I have told you on prior occasions, until you have heard both sides and have had the benefit of the argument and the Court's instructions, and it is important that you refrain from discussing the evidence or this case at all among yourselves during any of these recesses or overnight adjournments. This is a civil case and we will permit you to separate during recesses and adjournments, but please don't discuss the case, either among yourselves or, of course, not with any outsider. [20]

I might say, too, if there is a newspaper account of the case as it goes along—I suppose there will be some newspaper publicity and perhaps announcements over the radio—just skip that part of the news when you come to it. We prefer that you get your evidence first hand here from the witnesses.

Court will recess now until 1:30.

(Whereupon, the trial in the instant cause was recessed until 1:30 o'clock p.m., this date.)

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had out of the presence of the jury:)

Mr. Etter: Your Honor, at this time and prior to the time that the jury comes in, it not appearing in the pleadings on either side or any motions made on either side as to the residence of the defendant Scobee, the plaintiff being without knowledge at the time service was made as to [21] the residency of the defendant Scobee, hereby moves to dismiss from

the action the defendant F. W. Scobee, who is now named as a defendant in this cause, and further moves to amend the pleadings by showing the plaintiff as being a resident and citizen of the State of Washington.

The Court: Very well. Do you have any objection to the amendment?

Mr. McKevitt: I won't object, your Honor, on the ground it isn't timely made.

The Court: Very well, the motion will be granted and the pleadings stand amended as indicated by the motion.

I think I should, of course, tell the jury when they come in that the defendant Scobee has been dismissed, because they are entitled to know that.

Mr. Etter: Yes, your Honor.

Mr. McKevitt: Yes, I am glad your Honor made that suggestion.

(Whereupon, the following proceedings were had in the presence of the jury:)

The Court: Gentlemen of the jury, in your absence, on motion of the plaintiff, without objection, and by order of the Court, plaintiff F. W. Scobee has been dismissed as a defendant in this case. So that the case will proceed now as the case of Ernest Everett against the Northern [22] Pacific Railway Company, a corporation, defendant.

You may proceed, then, Mr. Etter.

Mr. Etter: Your Honor, at this time, the defendant has prepared a scale chart of the area involved in this accident, and with the Court's permission, I would like to have it marked.

Do you wish to have it marked as your exhibit?

Mr. McKevitt: Very well.

Mr. Etter: I would like to have it marked as Defendant's Exhibit No. 1.

The Court: Very well.

Mr. Etter: And we would like leave of Court to change the order of proof in this respect, that Mr. McKevitt will be allowed to put on the man who prepared this for the purpose of explaining it to the jury to expedite the matter.

The Court: Yes, all right.

The Clerk: This exhibit will be marked as admitted, your Honor?

The Court: Yes. I assume you have no objection?

Mr. Etter: I have no objection, your Honor, stipulate for its admission.

The Court: Defendant's Exhibit No. 1 will be admitted, and then if Mr. McKevitt cares to do so, he may put on a witness to explain it. [23]

(Whereupon, the said chart was admitted in evidence as Defendant's Exhibit No. 1.)

Mr. McKevitt: We were agreeing to furnishing the map characterizing the location, but with reference to calling of the engineer to explain the map, why, I think that is part of Mr. Etter's case to show what the map shows.

Mr. Etter: If he is here, I will do it.

Mr. McKevitt: Yes, Mr. Adams is here.

Mr. Etter: All right.

Your Honor, I might inquire of the jurors

whether they can see this map at this location? If not, we will probably have to change it.

The Court: Can you all see the map there? It may be difficult for you to see some of the fine lines in there, but then in order to get it closer to all of them, you would have to put it in middle here. Can you see the markings on the map?

A Juror: Yes.

The Court: Well, if the end men here can, then it ought to be all right.

Mr. Etter: Your Honor, I might say that up at the end of this map is what is designated as the whistle post. It should be in here and I am just trying to determine where. [24]

Well, Mr. Carlile says he will hold it and the jury can probably get it.

Mr. Adams, will you take the stand, please.

Mr. McKevitt: Keep your voice up.

WALTER R. ADAMS,

called and sworn as a witness on behalf of the plaintiff, testified as follows:

The Clerk: Did you want Mr. Adams to sit down, Mr. Etter?

Mr. Etter: Beg pardon? I think probably we could expedite it if you just stand over here (indicating).

Direct Examination

Q. (By Mr. Etter): You state your name, please. A. My name is Walter R. Adams.

Q. Where do you live, Mr. Adams?

A. I live in Seattle.

(Testimony of Walter R. Adams.)

Q. And by whom are you employed?

A. I am employed by the Northern Pacific Railway.

Q. And what is your position with the Northern Pacific?

A. I am Division Engineer on the Tacoma Division.

Q. The Tacoma Division. And for what length of time have you been Division Engineer, Mr. Adams? [25]

A. About two or three years.

Q. And is part of your duty as a Division Engineer for the Northern Pacific in Seattle to, upon request, draw scale maps of particular parts of the railroad trackage or areas of the Northern Pacific property?

A. Yes, sir.

Q. And the Tacoma Division, it does include, does it, certain trackage running east and west into and out of Ellensburg, Washington?

A. Yes, sir.

Q. And does it include a particular trackage starting at the city limits of Ellensburg and running in a westerly direction of several miles?

A. It does.

Q. Pursuant to request made to you, Mr. Adams, did you prepare a chart of the area where the accident happened that is the basis and the issue in this lawsuit?

A. This chart was made under my direction.

Q. It was made under your direction?

A. Yes, sir.

(Testimony of Walter R. Adams.)

Q. In the engineer's office? A. Yes.

Q. And to your knowledge, is the chart an accurate representation of the particular area as a chart or diagram?

A. It was made up from survey notes which I made myself, [26] personally, and supervised the preparation of the map.

Q. And supervised the preparation of the map. Now, with respect to the map, Mr. Adams, will you tell us and explain to the jury the directions as they appear on the map?

A. Compass north is indicated by this arrow marked "N." The terminology from the railroad parlance is east and west along this line (indicating), which is the main line of the Northern Pacific, with Ellensburg being at this direction and Seattle in that direction.

Q. Mr. Adams, would you mind taking this pencil and at the board end of the diagram, that is, Defendant's Exhibit 1, here and at the other end, will you put fairly large "E" and "W" to show east and west, and then the jury and the Court and the rest of us can follow it? Put it right up on the board there, or, rather, that is it, right about in there. A. (Witness complies.)

Q. And will you put a north and south likewise on there at a convenient place?

A. (Witness complies.)

Q. Make them a little larger, if you will, Mr. Adams. A. I have done so.

Q. Thank you, sir. Now, in the preparation of

(Testimony of Walter R. Adams.)

the Defendant's Exhibit 1, Mr. Adams, did you employ a particular scale to indicate length in feet?

A. Yes, sir, which is noted on the map, the scale one inch is equal to 20 feet.

Q. That is as to all of the distances, roadways and other matters appearing upon the map?

A. Yes, sir.

Q. One inch to 20 feet? A. Yes, sir.

Q. Now, Mr. Adams, you have observed, have you not, that general area when you were making your field notes? A. Yes, sir.

Q. Would you explain the diagram that you have drawn there, indicating what is the railroad, the overpass, et cetera, as it appears to the jury?

A. These two lines to which I am now pointing with the pointer represent the main line of the Northern Pacific Railway. The parallel lines to the north represent the highway, the east and west highway.

Q. Would you take the pencil now and just before the two lines that represent the railroad, would you put "N.P." and above the other put "P.H." for public highway? Make those rather large so we can see them, and initial each one of them, please, if you will, Mr. Adams.

Mr. McKevitt: Would you mind, Max, making that "N.P Main Line?" [28]

Mr. Etter: "N.P. Main Line," Mr. McKevitt suggests, Mr. Adams.

A. "P.H." for public highway?

Q. You might put "Public H.," then we won't

(Testimony of Walter R. Adams.)

lose track of it. That is Public Highway, is it not, sir? A. "Public Hwy."

Q. Thank you, sir. All right, if you will continue.

A. And "N.P. Main Line" (indicating).

Q. All right, will you explain the rest of the diagram?

A. The particular crossing involved is represented by these two lines to which I am now pointing, and south of the track, the highway, the road divides, part of it running west, part of it south, and part of it running southeasterly to the Milwaukee undercrossing, the Milwaukee Railway.

The Milwaukee overpass is represented by these lines to which I am now pointing, and at each end of this blocked-in area there is a concrete pier, with a concrete pier on either side in between the ends, so there are four concrete piers supporting the Milwaukee.

Q. That is correct.

A. Would you like to have me say this road from the crossing goes out and goes in underneath the Milwaukee?

Q. Could you tell us whether you remember from your [29] observation notes that after the road to which you have reference crosses under the Milwaukee underpass, could you tell us whether or not it goes then in an easterly and westerly direction paralleling the track or close thereto?

A. No, it doesn't quite, it goes in a southerly

(Testimony of Walter R. Adams.)

direction about as my end of my pointer (indicating).

Q. Probably southeasterly, would that be fairly correct?

A. Well, it is southeasterly from what this is shown, yes. It is actually compass direction south.

Q. I see.

Mr. McKevitt: Should he mark the Milwaukee while he is at it, Max?

Mr. Etter: Yes.

Q. Now, if you would, would you mark this on the Milwaukee, and I think probably where you indicated the crossing, if you will just put "Crossing" there so we can get all those points established?

A. I have written "Milw." for Milwaukee.

Q. Thank you.

A. And how would it do to just put "Xing" over here?

Q. That is fine. Put it up closer, if you can, oh, say, right in about here (indicating). Would that be about right, "Xing"?

A. All right. I have done so. [30]

Q. Thank you. Now, are there any other points that you drew on the map that aren't indicated by the name that would give us some idea on distances there, like posts or otherwise?

A. Yes, at the extreme east end of the map is a little mark which indicates the location of a whistle post.

(Testimony of Walter R. Adams.)

Q. Can you put "W.P." on that? Mr. Carlile, you can hold it there. A. "W.P."

Q. Initial that, too.

A. (Witness complies.)

Q. Probably better initial these others, Mr. Adams, that you missed here, "Xing" and "Milw."

A. "W.R.A." is put on, my initials.

Q. If you can without the necessity of measuring, can you tell the members of the jury and the Court how far the whistle post, as you have indicated there, is in feet from the crossing?

A. 1,323 feet.

Q. 1,323 feet?

A. From the center of the crossing.

Q. From the center of the crossing to the whistle post, 1,320 feet? A. 1,323.

Q. 1,323. Now, can you, without measurement, give us an [31] idea of how far it is from the whistle post to the middle of the overpass, to a point on the Northern Pacific track about the middle of the overpass?

A. The middle of the overpass is 686 feet from the center of the crossing.

Q. I see.

Mr. McKevitt: He asked you about the whistle post distance.

A. You have to deduct 686 from 1,323.

Q. (By Mr. Etter): 637, am I right?

Mr. McKevitt: Not very good at arithmetic, Max.

Q. (By Mr. Etter): But it is 686 feet, never-

(Testimony of Walter R. Adams.)

theless, is that it, from the middle of the crossing?

A. That is from the middle of the crossing to the middle of the overhead crossing.

Q. Of the overhead, 686 feet? A. Yes, sir.

Q. Consequently, the balance of the distance, whatever it might be, as you have indicated, is the difference between that and the 1,323?

A. Yes, sir.

Q. Now, can you tell us, Mr. Adams, the height of the overpass, the clearance, I guess you call it, the clearance height from the N.P. tracks?

A. I can by referring to my notes. [32]

Q. That is all right, if you wish to do so.

A. It is in the neighborhood of 22 feet, I know that.

Q. It is in the neighborhood of 22 feet?

A. 22 feet.

Mr. McKevitt: What is that Max, the height?

Mr. Etter: The height of the overpass from the track of the road bed of the N.P.

A. That is from the top of the rail. 22½ feet is the overhead clearance from the top of the rail to the bottom of the girder over the Northern Pacific track.

Q. Fine. All right, thank you, Mr. Adams.

I might ask, Mr. Adams, it is not shown on the map, but if you are familiar with it, following the Northern Pacific main line in an easterly direction toward Ellensburg, shall we say, down where the block signals are that are some considerable distance east?

(Testimony of Walter R. Adams.)

A. I do not know, I didn't check up on that.

Q. You didn't check? A. No.

Q. You aren't able to tell me what that distance is?

A. I have it indicated on a profile which I have with me, but I wouldn't say that that is correct and I want to say everything I say is correct.

Q. Certainly, certainly. Can you tell me offhand or approximately the distance from the crossing in an [33] easterly direction toward Ellensburg, can you tell me the distance that the rail line of the Northern Pacific Railroad is almost straight without any curves? Do you know that distance?

A. No, but I can look it up. It is several miles.

Q. Could you do that without too much difficulty? A. From the crossing?

Q. Yes, from the grade crossing.

A. The first curve is right near the—not very far from the Ellensburg depot. It would be several miles or nearly four miles.

Q. It would be several miles? A. Yes.

Q. In which the railroad is in a straight easterly and westerly direction up to this crossing?

A. Yes, sir.

Q. Is that correct. Can you tell me, Mr. Adams, with respect to the amount of grade that is involved in the track extending from, oh, about the curve just approximately, I don't think it need be absolutely exact, down to about the grade crossing?

A. It is an uphill grade, generally speaking, from Ellensburg west.

(Testimony of Walter R. Adams.)

Q. From Ellensburg west?

A. Generally speaking, is an uphill grade. [34]

Q. Generally speaking, there is an uphill grade. Do you know what the degree is? Offhand, do you know what the degree of grade is?

A. Well, it varies considerably. It varies, every little ways it changes.

Q. I see. A. In per cent of grade.

Q. I see. But you would say it is a slight grade toward the west?

A. Yes. It varies. Well, I have five-tenths of 1 per cent up to one-tenth of a per cent, .36 per cent. It varies considerably, but it is all, I would say, less than five-tenths.

Q. It is all less than five-tenths of 1 per cent?

A. Which means half a foot per hundred feet.

Q. Half a foot per hundred feet? A. Yes.

Q. In other words, there is less than a half a foot of grade per hundred feet in that whole stretch of track; is that correct?

A. I don't see any place where it is over five-tenths of 1 per cent.

Q. Over five-tenths of 1 per cent?

A. Just—— do you want me to describe it a little more particularly? [35]

Q. Yes, I would.

A. Just east of the crossing?

Q. Yes, if you would, please.

A. Just at the crossing, it is .49 per cent ascending westward.

Q. At the crossing?

(Testimony of Walter R. Adams.)

A. Right at the crossing.

Q. All right.

A. Prior to the crossing, there is what we call a vertical curve which is 1,400 feet long, and just beyond that there is a slight descending grade going west.

Q. I see.

A. Six-hundredths of 1 per cent, which is about six-eighths of an inch in 100 feet.

Q. That would be the descending grade that you are taking about?

A. Yes, that would be that descending grade that is the other side of this 1,400 foot vertical curve.

Q. I see. The 1,400 foot vertical curve, you do not mean a curve in the track, but on the matter of grade?

A. I can explain that very readily.

Q. All right, sir.

A. By a reference to a highway grade. As you are approaching a change in the grade of the highway, changing from going up to going down, you can't see beyond that. [36]

Q. I see.

A. But there is a change, not abrupt, there is no abrupt change, but a slight change, each hundred feet as it goes over a summit or through a valley.

Q. You speak of a slight change there?

A. Yes.

Q. All right.

A. For that 1,400 feet, it would probably be about a twenty-five hundredths or about three

(Testimony of Walter R. Adams.)

inches, average about a twenty-five hundredths grade for that 1,400 foot, although it wouldn't be at that grade at any particular point.

Q. I see.

A. It is cubic perabla, if I can get technical.

Q. In other words, what it is in laymen's language, during that 1,400 feet, that is the gradual grade that you have given us in one-hundredths?

A. It is a gradual change.

Q. Change, rather.

A. Change in grades, from almost a zero grade to a five-tenths grade. The average would be about three inches per hundred feet. That would be the average for the whole distance.

Q. All right, now, Mr. Adams, in the corner, or rather up [37] toward the north along the highway, you have a square drawn in there. Will you tell us what that indicates?

A. That is the location of the house.

Q. Known as the O'Neill house?

A. That is the way I understand it.

Q. Yes. Would you write in there "O'Neill House"?

A. "O'Neill House" and initials.

Q. Thank you.

A. "Ho," representing house.

Q. Could you tell me, Mr. Adams, or do you remember when you were making your field notes, and I am not going to ask you to put it in, but do you remember whether there were also some buildings over on this side or the west side of the

(Testimony of Walter R. Adams.)

highway which is shown running past the O'Neill house?

A. There were some buildings over there, but just where they were, I don't know.

Q. You don't know, but you did see buildings over there? A. Yes.

Q. All right.

Mr. Etter: I think that is all, Mr. Adams.

Mr. McKevitt: A few questions, your Honor.

The Court: Yes, all right. [38]

Cross-Examination

Q. (By Mr. McKevitt): Mr. Adams, when you speak of a grade of $3/100$ ths, generally, is that a generally ascending grade?

A. It is a general ascending grade from Ellensburg to this location.

Q. But it varies?

A. It varies at different locations.

Q. Are you able to tell us, say, from a point at the underpass, the center of the underpass to the center of the crossing, whether the grade is a gradual descending or ascending, or what?

A. It is gradually ascending from the Milwaukee underpass to the crossing.

Q. But never reaches a height above what?

A. Above five-tenths.

Q. Yes. A. That is half a foot.

Q. 1 per cent grade means a rise of one foot in each 100 feet?

(Testimony of Walter R. Adams.)

A. Yes, sir. That is where that vertical curve I was telling you about is in.

Q. Yes. You have given us the distance of the whistling post to the center of the crossing is 1,323 feet, is that correct? A. Yes, that is correct.

Q. And then you have given us the distance from the center of the road bed in the middle of the underpass to the center of the crossing, is that correct? A. 686 feet, yes, sir.

Q. Now, how much trackage, Milwaukee trackage, do you show on that map? Would you scale that off for us, from this point here which I am pointing to to this point? Got your ruler with you?

A. Yes. 40 inches times 20 is 800 feet.

Q. 800 feet. Now, with reference to the highway on which thing young lady was driving, we want all the jurors to see that.

Mr. McKevitt: Are we agreed, Mr. Etter, that this area that I am marking—not marking, but tracing with my pencil—is the highway that she traveled on her approach to the crossing?

Mr. Etter: That is correct, the last part of it, Mr. McKevitt.

Mr. McKevitt: Shown on the map.

Mr. Etter: That is correct.

Mr. McKevitt: And that the Everett home is some one-half a mile towards the east end of the map?

A. That is correct, approximately one-half a mile east, approximately, from the grade crossing.

Q. By the way, Mr. Adams, I was down there

(Testimony of Walter R. Adams.)

with you when we went over this thing several weeks ago? A. Yes, sir.

Q. Do you recall whether or not this highway that comes out of Mr. Everett's home some distance up toward the east end of the map, whether it generally parallels the Northern Pacific track until it makes a kind of a right-hand turn?

A. Well, you might be able to say that generally, but it separates, if you are going down the highway toward the Everett home, it gradually gets a little further away from the track than it is at this particular point here (indicating).

Mr. Etter: That is correct, it does.

Mr. McKevitt: Well, then, Mr. Etter, could we have a designation on here, then, with arrows, "Route of Miss Everett" or "Route of the Truck"?

Mr. Etter, Yes, yes.

Q. (By Mr. McKevitt): Will you mark those on there, just pointing toward that and put the direction, "Direction of truck"? Just put "Truck" right after and the arrow will indicate she is traveling toward the track.

A. (Witness complies.)

Q. Now, will you scale off the distance on that roadway that she was traveling on that is shown on the map? [41]

A. I think I can tell you how far that was from the center of the Milwaukee crossing, if that would be all right.

Q. Yes.

A. I have that in my notes. Well, maybe I

(Testimony of Walter R. Adams.)

better scale it, because my notes, I would have to add them up and I am not very good at mental arithmetic.

Q. All right. A. 295 feet.

Q. 295 feet?

A. To the center of the Milwaukee Railroad.

Q. What you are talking about now, the 295 feet, is it——? A. Yes.

Q. ——represents the distance from the county highway or county road on which she was traveling as it passed under the Milwaukee, is that correct?

A. That is correct.

Q. To the crossing. Now, have you got some data or information on the grade of this county road from this point where the road passes under the Milwaukee to the crossing? A. I have.

Q. All right, tell us what that is.

A. At 12 feet from the crossing (indicating on map), the road is six-tenths, or 7 inches. Engineers use the designation tenths and I am liable to confuse the jury [42] unless I explain what that means.

In order to add up feet and inches, we are liable to get mixed up, so we use what we call tenths of a foot. Instead of six inches, it is five-tenths, and you can just add them right up and not have to divide by 12 when you get through for your inches. So if you will excuse me if I say tenths once in awhile instead of inches.

Q. All right.

A. 12 feet from the crossing, it is seven inches

(Testimony of Walter R. Adams.)

below the center of the crossing. 18 feet further——

Q. In feet toward——

A. This way (indicating).

Q. When you say “this way”——?

A. Toward the home of the Everetts.

Q. That’s right.

A. It is five inches lower yet.

Q. What is the grade there?

A. Well, the grade in that 18 feet would be a 7 per cent grade.

Q. 7 per cent grade.

A. Then at 100 feet, which is 70 feet further, there is a drop of two feet and one inch, which would make it, that 70 feet from the 30 feet to 100 feet, which would make the grade a 3 per cent grade in that 70 feet, and [43] the next 18 feet is a 7 per cent grade.

Q. Well, now, would it be too much trouble, could you quickly estimate the average grade of this county road from where it passes under the Milwaukee Railway Company to the center of the crossing? Just the average grade?

A. Well, the 300 feet and a five foot raise from the center of the Milwaukee crossing to the center——under the Milwaukee to the crossing at the Northern Pacific track is——

Q. The average grade is what?

A. Five feet divided by 300 is approximately 1.7 per cent grade.

Q. That is the average grade?

A. That is the average grade.

(Testimony of Walter R. Adams.)

Q. Now, you have designated on this map what is known as the O'Neill house. From this (indicating), that would be generally the southerly line of the house, wouldn't it? A. Yes.

Q. From the center of the southerly line of the house, how far is that to the center of the crossing?

A. The center of the railway crossing?

Q. That is correct? A. 553 feet. [44]

Q. 553 feet?

A. From the center of the railway crossing measured along the road to the south line of the O'Neill house.

Q. Well, what is the distance from the center of this highway to the center of the crossing in a straight line?

A. Well, from the edge of the highway to the center of the crossing——

Q. All right, that is good enough.

A. It is 154 feet.

Q. 154 feet.

Mr. McKevitt: I think that is all.

Mr. Etter: Just a few questions.

The Court: Yes.

Redirect Examination

Q. (By Mr. Etter): Mr. Adams, just one or two questions more, if I may. If I understood your testimony in answer to some of Mr. McKevitt's inquiries, the distance between the spot where the road that the truck was on where it passes under

(Testimony of Walter R. Adams.)

the Milwaukee overpass to the middle of the grade crossing, you say, was 300 feet?

A. 295, 300 feet.

Q. Do your field notes show, starting in with the Milwaukee grade crossing, starting underneath it, do they show [45] the percentage of grade for the first 100 feet? A. Yes.

Q. What is that percentage?

A. Two-tenths per cent grade for the first hundred feet.

Q. Two-tenths per cent? A. Yes, sir.

Q. In inches, how much would that be?

A. Two-tenths——

Q. Would be two inches?

A. A little over two inches.

Q. A little over two inches of grade in the first hundred feet? A. Yes, sir.

Q. All right, then, in the second hundred feet?

A. Practically level.

Q. Practically level?

A. Yes. There is two-tenths difference in that next hundred feet, too.

Q. I see. Then, the first 200 feet, if I am correct, the first 200 feet from the Milwaukee overpass in the direction of the Northern Pacific main line, the first 200 feet is practically level?

A. To all intents and purposes, yes.

Q. To all intents and purposes. Then in the last 90 feet, there is approximately a five foot difference, is there not? [46]

(Testimony of Walter R. Adams.)

A. Correct, yes.

Q. How much grade is there, if you can tell us, in the next 50 feet beyond the first 200?

A. I can't tell you that.

Q. Can you tell us the next 100?

A. I can tell you the next 70.

Q. All right, the next 70?

A. That is a three per cent grade.

Q. Three per cent? A. Yes.

Q. And how many inches would that be?

A. Well, it is two feet and one inch, approximately.

Q. Two feet and one inch? A. In 70 feet.

Q. Oh, the first 200 feet is practically level and then in the next 70 feet there is a two foot raise?

A. Yes, sir.

Q. A two foot raise. Then beyond that, the next 25 feet, there is a three foot raise?

A. No, the next 30 feet there is a two foot raise.

Q. Another two foot raise?

A. Yes. That is to the center of the crossing.

Q. To the center of the crossing? A. Yes.

Q. I see.

A. But the next 18 feet, there is a little less than that.

Q. There is a little less. How much is there there? A. One foot, four inches.

Q. All right, now, if I have it correctly, to recap, we have 200 feet that is almost level?

A. Yes.

(Testimony of Walter R. Adams.)

Q. With the exception of a few inches. The next 70 feet is an approximate two foot raise?

A. Yes.

Q. The next 70. Then beyond that, the next 30, is that correct?

A. The next, there is another two foot raise.

Q. There is another two foot raise?

A. Now, that 70 feet, excuse me, that 70 feet is—yes, that's right.

Q. There is a two foot raise? A. Yes.

Q. All right, and then in the next—was it 20 feet, did you say? A. 12 feet.

Q. The next 12 feet?

A. Is six inches up.

Q. Six inches up. And the last 18 foot? [48]

A. Well, the last 12 feet was six inches. From the crossing to 12 feet out, it would be the six inch raise.

Q. Then, the footage began, as you have indicated, 70 feet and the next 100 feet? A. Yes.

Mr. Etter: All right, I think that is all, Mr. Adams.

Mr. McKevitt: That is all. If I wish to excuse Mr. Adams, is that okay?

Mr. Etter: Yes.

Mr. McKevitt: One moment, please.

Mr. Thomas makes a suggestion which I think is in order.

Recross Examination

Q. (By Mr. McKevitt): The width of the underpass or overpass?

(Testimony of Walter R. Adams.)

A. From the Milwaukee Railroad?

Q. Yes?

A. I can give you the clearance.

Q. Well, you gave us the clearance at the top.

A. I can give you the sideways clearance, too.

Q. That is it.

A. That would be between these two middle concrete columns (indicating). [49]

Q. That's right.

A. To the north. From the center of the track to the edge of the column on the north is 10 foot, six inches, and from the center of the right track to the edge of this column (indicating) on the south is 24 feet, six inches. The total distance between the two columns at right angles to the track, therefore, would be 35 feet.

Q. That is what I have in mind.

Mr. Etter: Thank you.

Mr. McKevitt: That is all.

(Witness excused.)

Mr. Etter: Call Mr. Everett, please.

ERNEST EVERETT,

plaintiff herein, called and sworn as a witness on his own behalf, testified as follows:

Direct Examination

Q. (By Mr. Etter): Mr. Everett, when you are testifying, as his Honor indicated, the acoustics are rather difficult in this courtroom, so you

(Testimony of Ernest Everett.)

will have to speak up, keep your voice up. The Court has to hear you and so do counsel and all of these jurors, right to the last juror, so you keep your voice up, will you, sir? [50] A. Yes, sir.

Q. All right, will you state your name, please?

A. Ernest Everett.

Q. And where do you live, Mr. Everett?

A. Well, about half a mile below the railroad crossing to my gate.

Q. What state do you live in?

A. Oh, Washington.

Q. Washington. And you have stated below the railroad track, near what town?

A. Near Ellensburg.

Q. That is in Kittitas County?

A. Yes, sir.

Q. I see. And how long have you lived at your present home, Mr. Everett?

A. Since '50, the fall of '50.

Q. Since the fall of '50. That would be what month, do you recall? A. November.

Q. In November. And you have resided, Mr.—you are married, sir? A. Yes, sir.

Q. And how long have you been married?

A. Well, we celebrated our 29th wedding anniversary last Saturday. [51]

Q. This past Saturday? A. Yes, sir.

Q. 29 years. And you have had how many children? A. Four.

Q. Four children. And will you tell us, girls, boys? A. Three girls and one boy.

(Testimony of Ernest Everett.)

Q. Three girls and one boy. And how old is the oldest girl? A. She is 26.

Q. Is she married? A. Yes, sir.

Q. And the next girl? A. 24.

Q. Is 24. Is she married? A. Yes, sir.

Q. And the third girl was the deceased daughter, Erna Mae? A. Yes, sir.

Q. And you have another youngster at home?

A. Yes, sir.

Q. What is he? A. A boy.

Q. What age is he? A. 13.

Q. Beg your pardon? A. 13. [52]

Q. 13. And what is your occupation?

A. Well, I do a little farming and most of my work in a sawmill.

Q. I see. And your property, what does it consist of, your farm property, Mr. Everett?

A. Well, pasture mostly now.

Q. Got to speak up?

A. Pasture ground now. I farmed it for awhile.

Q. How much pasture ground do you have?

A. Well, 75 acres, 76 acres altogether.

Q. You say you did farm it for awhile?

A. Yes, sir.

Q. What type of farming?

A. Raised grain.

Q. Grain. And do you have any stock? Do you run any stock of any kind there?

A. Small bunch of sheep there.

Q. You have sheep. About how many?

A. A hundred.

(Testimony of Ernest Everett.)

Q. About a hundred head of sheep?

A. Uh-huh.

Q. And any other stock? A. No, sir.

Q. Can you tell us, Mr. Everett, or can you indicate to the [53] jury, if you are unable to from there, will you step down, if you can't find it on the map, at least give the jury an idea where you live in relation to the particular area that we see there?

A. Well, you mean the road, the railroad?

Q. Yes?

A. That is kind of behind, isn't it?

Q. Are you able to see the lines on this?

A. Yes.

A. On this map, and the railroad running here in an easterly-westerly direction?

A. Yes, sir.

Q. And the overpass, are you able to see that going through here? A. Yes, sir.

Q. And the road that eventually extends past your house approaching the railroad and the crossing over here? A. Yes, sir.

Q. All right. Now, will you tell us, directionally speaking, about where you live in or near that general area?

A. Well, it would be in kind of the southeastern part.

Q. Will you come down as close as you can and tell us about the relation that your house bears to the track there? This is, as Mr. Adams says, the whistle is here (indicating). [54]

(Testimony of Ernest Everett.)

A. It would be somewhere way down in here some place.

Q. Down in there. You want to watch your scale, you see. Your road comes down like this.

A. Well, it would be—this is the road here (indicating)?

Q. No, that is the railroad.

A. Would your county road be right in here?

Q. Your county road comes down in here like this.

A. Oh, yes.

Q. But down in there?

A. Over in here somewhere between this road and the track.

Q. That road and the track. In other words, you live back from the county road, don't you?

A. Oh, yes.

Q. About how far?

A. Oh, I would say it is about not quite a quarter of a mile from the house.

Q. From the county road. That is this road up here that extends down, is that correct?

A. Yes.

Mr. McKevitt: How far did he say?

Mr. Etter: Back from the county road?

Mr. McKevitt: Yes.

Mr. Etter: About a quarter of a mile, Mr. McKevitt. You can take the stand again. [55]

Q. In March of 1952, did you own a truck?

A. Yes, sir.

Q. What kind of a truck was that?

(Testimony of Ernest Everett.)

A. Well, it was a '40 Dodge panel, what they call a panel truck.

Q. A panel truck. And how long had you had that truck?

A. Well, I just got it that fall when I moved out.

Q. When you had moved?

A. Out here from Montana.

Q. Where had you been prior to the time that you moved to Washington?

A. I lived at Kalispell, Montana.

Q. Kalispell, Montana. How long had you lived in Kalispell before you moved over here?

A. Practically all my life.

Q. Practically all of your life. And what type of work over there?

A. Well, I worked for the county for quite awhile, then I did some farming for myself.

Q. You did some farming for yourself, all right. And you had a Dodge panel on the 8th day of March, 1952, is that correct? A. Yes, sir.

Q. Your daughter Erna Mae, the deceased girl, was she [56] staying with you, was she with you at that time? A. Yes, sir.

Q. And what was her age on the date that she was killed?

A. Well, she was 16. She would have been 17 the next month.

Q. I see.

Mr. McKevitt: Next when?

Mr. Etter: The following month.

(Testimony of Ernest Everett.)

Q. Was she in school there where you reside?

A. Yes, high school.

Q. She was in high school. And what grade was she in high school? A. Junior—or—junior.

Q. Beg pardon? A. Junior.

Q. Junior.

The Clerk: I have marked this photograph as Plaintiff's 2 for identification.

Q. (By Mr. Etter): Without indicating otherwise, will you just tell me what Plaintiff's Exhibit 2, is Mr. Everett? A. That is my daughter.

Q. And when was that picture taken?

A. Maybe she would know, I don't remember. Was it taken here? [57]

Q. No, with respect to March of 1952, was it taken a few months earlier than that?

A. Oh, yes.

Q. Do you recall what month?

A. No, I couldn't say exactly the month it was taken.

Q. Was it, though in the late fall of 1951?

A. It could have been.

Q. Yes. Her class picture, wasn't it?

A. Yes.

Mr. McKevitt: Taken when?

Mr. Etter: In November.

Mr. McKevitt: No objection.

The Court: It will be admitted, then. That is No. 2?

Mr. Etter: No. 2, your Honor.

(Whereupon, the said photograph was ad-

(Testimony of Ernest Everett.)

mitted in evidence as Plaintiff's Exhibit No. 2.)

Q. Mr. Everett, are you rather familiar with the railroad property in the general area indicated by the Exhibit No. 1? A. Yes, sir. [58]

Mr. Etter: Your Honor, may I just confer with counsel a minute about some writing?

The Court: Yes.

The Clerk: Your Honor, I have marked Plaintiff's Exhibits 3 through 12 for identification.

The Court: All right.

Mr. McKevitt: 3 to 12, both inclusive?

The Clerk: Inclusive.

Q. (By Mr. Etter): Handing you the Plaintiff's Exhibit 3 for identification, without going into any description at all, will you just tell us what that is, Mr. Everett?

Mr. McKevitt: May I examine the photographs along with counsel?

The Court: Yes, you may do that.

A. It is taken from the whistle stop west.

Q. (By Mr. Etter): From the whistle stop west.

Mr. McKevitt: No objection to that.

The Court: It will be admitted, then. That is 3, isn't it?

Mr. Etter: 3, your Honor.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 3.) [59]

Q. And No. 4, Mr. Everett?

(Testimony of Ernest Everett.)

A. That is taken from the whistle stop east.

Q. From the whistle stop east.

Mr. McKevitt: Whistle stop looking east?

Mr. Etter: Looking east, yes.

Mr. McKevitt: No objection, your Honor.

The Court: It will be admitted. That is 4.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 4.)

Q. (By Mr. Etter): No. 5?

A. That is taken looking west—looking west.

Q. Looking west?

A. From the underpass.

Q. Do you know where it is taken, how far back that is? Do you know that spot?

A. Well, it is kind of a culvert creek down.

Q. A culvert creek, all right.

Mr. McKevitt: Off the record, is this looking east towards Ellensburg?

Mr. Etter: No, it is looking west.

Mr. McKevitt: It is taken from a point east of the [60] Milwaukee overpass?

Mr. Etter: That is correct.

Mr. McKevitt: Looking west?

Mr. Etter: Looking west, that is correct.

Mr. McKevitt: How far east to the overpass?

Mr. Etter: In excess of 2,000 feet.

Mr. McKevitt: Approximately 2,000.

Mr. Etter: I think it is possibly a good 700 or 1,000 more than that. We measured the 2,000 and walked up the track.

(Testimony of Ernest Everett.)

Mr. McKevitt: Well, you approximate it and I will take your word for it.

Mr. Etter: I think it is approximately between 2 and 3,000.

Mr. McKevitt: Feet east of the Milwaukee overpass?

Mr. Etter: Correct.

Mr. McKevitt: All right, no objection.

The Court: It will be admitted, then.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 5.)

Q. (By Mr. Etter): Plaintiff's Exhibit No. 6, Mr. Everett? [61]

A. This is looking east from the railroad, from the road crossing, toward the underpass.

Q. Looking east towards Ellensburg from the grade crossing? A. Yes.

Mr. McKevitt: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 6.)

Q. (By Mr. Etter): No. 7?

A. This was taken on the west side of the underpass, taken in the underpass.

Q. On the west or the east side?

A. The east.

Q. On the east looking west?

A. Yes, the east looking west.

Q. Looking west down toward the crossing?

(Testimony of Ernest Everett.)

A. Yes.

Q. All right.

Mr. McKevitt: No. 7, then, the camera is facing west?

Mr. Etter: Correct. [62]

Mr. McKevitt: At some point a slight distance east of the underpass?

Mr. Etter: Yes, a point about—as a matter of fact, it is about 30 feet or close thereto.

Mr. McKevitt: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 7.)

Q. (By Mr. Etter): Now, No. 8?

A. That is taken approaching the underpass.

Q. No, approaching the grade crossing.

A. Or the road crossing, yes.

Q. The road crossing itself, and a panoramic shot, so-called, isn't it?

The Clerk: Your Honor, I'm sorry, these photographs run through No. 13, rather than 12.

The Court: All right.

Mr. McKevitt: May I ask some questions on voir dire on this one?

The Court: Yes.

Mr. McKevitt: Mr. Everett, did you take this picture which is Plaintiff's Exhibit 8? [63]

A. No, sir.

Mr. McKevitt: Were you present when it was taken? A. No, sir.

(Testimony of Ernest Everett.)

Mr. McKevitt: Well, who took it, Max?

Mr. Etter: Bell.

Mr. McKevitt: Who?

Mr. Etter: Bill Bell.

Mr. McKevitt: When was this picture taken?

Mr. Etter: June 26, 1952.

Mr. McKevitt: And where is this car standing?

Mr. Etter: The car is on the county road before it makes the curve, I would say, or after it makes the curve, rather, under the viaduct. I would say, if you want my estimate of it, it is about 175 to 200 feet from the grade crossing.

Mr. McKevitt: I have to object to this picture, if your Honor please, taken June 26, 1952. That is March, April, June, is some three and a half months afterwards, and, since vegetation and obstruction entered into this case, I would have to object to that photograph.

Mr. Etter: Well, I can qualify it in that respect, if you wish.

Mr. McKevitt: You can't qualify it to go with the vegetation in three and a half months.

The Court: Well, I think there should be [64] some evidence as to similarity of conditions before it is admitted. That is number what?

The Clerk: That is No. 8.

Mr. Etter: No. 8.

Q. Mr. Everett—

Mr. McKevitt: Your Honor admitted that, may I inquire?

Mr. Etter: No.

(Testimony of Ernest Everett.)

The Court: No, I felt there should be some evidence of similarity of conditions or as to the comparison of conditions.

Mr. McKevitt: Then, the objection is sustained?

The Court: Yes, for the present.

Q. (By Mr. Etter): Mr. Everett, did you examine the general area about the crossing and along the fence line to a distance of or 300 feet from the grade crossing shortly after your daughter was killed? A. Yes, sir.

Q. How soon after?

A. Well, right away after.

Q. Right away after. Did you observe the condition of the brush, growth and vegetation in that area from a point possibly 200 feet from the grade crossing in a generally southerly or easterly direction or along that county road? A. Yes, sir.

Q. And what was that condition?

A. Well, there was tall brush all along there.

Q. Tall brush all along that area?

A. All along there.

Q. Now, on June the 26th, you were not present for these pictures? A. No, sir.

Q. But you were along this particular area, were you not, on June the 26th; is that correct?

A. Yes, sir.

Q. As appears in Exhibit 8, was that the general condition of the area? A. Yes, sir.

Q. Could you tell us what difference there is, if there is any, between the area that is represented there on June the 26th and the area as you saw

(Testimony of Ernest Everett.)

it when you examined it the day after your daughter was killed on March the 9th?

A. There was more brush there then.

Q. More brush where?

A. Along there then. It had been cut off.

Q. There was more brush in March than there was on this date? A. Yes. [66]

Q. Was there any difference, however, in the vegetation itself?

A. Well, of course, the stuff wasn't in bloom at that time.

Q. In bloom when?

A. In June, but in March there was more.

Q. You say it wasn't in bloom in March, isn't that what you meant?

A. Yes. No, it wasn't.

Q. But in June it was? A. Yes.

Q. I see. What is the difference between, if there is any? You said the difference that this was more in March than there was in June?

A. Higher brush, it had been cut off.

Q. I see, than there appears in this picture?

A. Yes, sir.

Q. Did the brush, the high brush that you described, or the brush that was there in March, did that stay on, was anything done about that brush, do you know?

Mr. McKevitt: Is this for the purpose, may I inquire of getting——

Mr. Etter: Well, I will move it be admitted

(Testimony of Ernest Everett.)

now on his testimony thus far. Unless you have *voir dire*.

Mr. McKevitt: I still object to it. [67]

The Court: It will be admitted, then. Let's see, that is No. 9?

The Clerk: 8, your Honor.

The Court: I mean this was 8, yes, the next one.

Mr. McKevitt: I want the record to show, also, if your Honor pleases, improper identification or lack of identification of this photograph.

The Court: All right, the record may so show.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 8.)

Q. (By Mr. Etter): Handing you Plaintiff's Exhibit No. 9, can you tell me what that is?

A. That is taken along the county road toward the underpass.

Q. Toward the underpass. And are the same differences present there? The brush is in bloom here and it was not in March, is that correct?

Mr. McKevitt: I object to the form of the question, leading and suggestive.

Q. (By Mr. Etter): All right, tell us the difference. Mr. Everett, just tell me the difference between the brush as it appears here in June and as it appeared in [68] March when you went down there and took a look at it?

Mr. McKevitt: Object to the form of that question. It is assuming there was a difference.

(Testimony of Ernest Everett.)

Q. (By Mr. Etter): All right, is there a difference between the brush as it appears here and as it appeared to you in March?

A. After it was cut down, a lot of it, sure, it would be different.

Q. Well, what is the difference, if you will tell us?

A. Well, have a better view after it is cut off. Still ain't very good.

Q. I see. No, but I want you to confine yourself, if you will, Mr. Everett, to this particular exhibit. Will you tell me now in what respect that differs from the brush as it was in March. Just tell us very plainly, if you will.

A. You got a better view after the brush is cut off.

Q. And in what other respects? Does it differ in any other respect, Mr. Everett, than it did on March 9th? That is what I am asking you.

A. Oh, well, after you cut down the brush, why, it naturally would make a difference in the viewpoint.

Q. I see. A. Of the railroad.

Q. Any other difference in the appearance of the vegetation? [69]

A. Well, it would be bloomed out in June, I suppose.

Q. It what?

A. It would be kind of bloomed out in June, I suppose, where it wouldn't be in March.

(Testimony of Ernest Everett.)

Q. I see. Otherwise, can you name any other differences? A. No.

Mr. Etter: I will move that the exhibit be admitted on that qualification, your Honor.

Mr. McDevitt: I want to examine on voir dire. Did you take this picture?

A. No, sir.

Mr. McKevitt: Were you present when it was taken? A. No, sir.

Mr. McKevitt: Do you know when it was taken except what you have heard here?

A. In June.

Mr. McKevitt: Well, you know that from what Etter tells you? A. Yes.

Mr. McKevitt: Do you know where the camera was stationed at the time this picture was taken?

A. No, sir.

Mr. McKevitt: Object to it as not being properly identified and as being incompetent, irrelevant and immaterial. [70]

Mr. Etter: One more question.

Q. I will ask you whether or not you were down in that area that day?

A. Yes, I go through there every day.

Q. All right, does this actually represent the condition of the brush as you found it or as you saw it on the 26th day of June? A. Yes.

Mr. Etter: Are you going to object because I haven't got the cameraman.

Mr. McKevitt: I am going to object because I don't know how far that camera was from the

(Testimony of Ernest Everett.)

crossing. It might have been 200 feet toward his home or 100 feet toward the crossing.

The Court: I will take a recess and I will excuse the jury for the afternoon recess.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: I didn't realize there was going to be an objection here on lack of identification.

Mr. Etter: I didn't, either.

The Court: As to these photographs, I think if counsel chooses to object, I don't think there has been proper identification here, because he is entitled to know [71] when these were taken and the light condition and the camera angles and the distance, and so on. He should be able to cross-examine on those points, if he wishes, so I had assumed that the only objection here was the failure to show substantially similar conditions between the time of the accident and June. But if the objection is made that they are not properly identified, I don't believe they have been.

Mr. Etter: No, that is correct.

The Court: That is 8 and 9, both.

Mr. Etter: Have to have camera angles and I will have to get the photographer and I will require him to bring his.

Mr. McKevitt: Wait a minute, Mr. Etter, let's be fair. You didn't show me those two pictures this morning.

Mr. Etter: I showed you every one of these.

Mr. McKevitt: I said so far as having a photog-

(Testimony of Ernest Everett.)

rapher here, but I assumed, like when you refer to my pictures, I know where that camera was.

The Court: I don't think I need to be in on this. I will recess.

Mr. McKevitt: I want to know where the camera was, that's all.

The Court: Court will recess for 10 minutes.

(Whereupon, a short recess was taken, [72]

after which the following proceedings were had in the presence of the jury:)

Mr. Etter: Your Honor, Mr. McKevitt and I—I have given him the feet at which these pictures were taken and the position from which they were taken——

Mr. McKevitt: You refer to exhibit numbers, Max.

Mr. Etter: So I am referring at this time to Exhibit Nos. 9, 10 and 11.

The Court: Wasn't 8 included in that, too?

Mr. Etter: 8 was admitted, but I guess if there is an objection——

The Court: Yes, I thought the same ruling should be made on that, unless you have reached an agreement on it.

Mr. McKevitt: Until I get the data from Mr. Etter on this, I can't commit myself one way or the other.

The Court: I will just withhold my ruling on that until you do.

Mr. Etter: But on 9, 10 and 11, I have given him the distance in feet from the crossing itself

(Testimony of Ernest Everett.)

and the direction in which the camera was pointed, and Mr. McKevitt says there will be no objection.

Mr. McKevitt: Location of the camera.

Mr. Etter: Location, yes. The question now is the matter—— [73]

Mr. McKevitt: You got the data on the back.

Mr. Etter: On each one of them.

Mr. McKevitt: All right.

Q. (By Mr. Etter): Now, 9, Mr. Everett, can you tell us if that is——

Mr. McKevitt: I think, if the Court please, for the purpose of acquainting his Honor with the position taken, this all goes to the question of identification, but when they are offered in evidence, I am not admitting that they are material.

The Court: Yes. I had assumed that you are not pressing your objection to lack of identification, but you reserve all other objections.

Mr. McKevitt: That is exactly correct, your Honor. Thank you.

Mr. Etter: Correct.

Q. Does that accurately represent the condition that existed on June the 26th? A. Yes.

Q. As to that particular picture, Mr. Everett?

A. Yes, sir.

Q. And in what respects, will you tell us, does that differ from the condition as it existed on March the 8th, 1952?

A. Well, the brush is shorter and a little more foliage. [74]

Q. A little more foliage? A. Yes.

(Testimony of Ernest Everett.)

Q. In other respects, does it accurately represent what existed there on March the 8th, with those exceptions, that it is shorter but it is more filled out? A. Yes, sir.

Q. All right.

Mr. McKevitt: Are you offering that now?

Mr. Etter: No, I am going to put them all in at once.

Q. And, likewise, would that be true with respect to No. 10?

Mr. McKevitt: I object to the form of this question.

Q. (By Mr. Etter): All right, then, does that accurately represent the situation as it existed in June? A. Yes, sir.

Q. The 26th of 1952? A. Yes, sir.

Q. Now, can you tell us the difference that exists as you note it there from that condition on June the 26th, 1952 as compared to on or about a few days after March the 8th of 1952?

A. Well, more brush been slashed down in there.

Q. All right, and anything else different? [75]

A. More foliage on this brush that stands.

Q. I see. In other respects, is there any difference from that condition as it exists as you see it in that picture and as it existed March 8, 1952?

A. No.

Q. All right, with respect to No. 11, taken 70 feet from the crossing facing the overpass, do you recall whether that was an accurate representation

(Testimony of Ernest Everett.)

of the condition as it existed on June the 26th of 1952? A. Yes, sir.

Q. And you had an opportunity to examine this entire area, did you, in March shortly after the 8th day of March of 1952? A. Yes, sir.

Q. Does this accurately represent it as it appeared in June when you looked at it?

A. Yes, sir.

Q. And can you tell us what differences there are that you can note between this picture taken on June 26, 1952 and the appearance of the particular area as you saw it in March of 1952 after the date of the accident?

A. There is more view of the road now than there was then.

Q. There is more view of the road? [76]

A. In the railroad, yes.

Q. In that exhibit than there was then, is that correct? A. Yes.

Q. Any other differences? A. No, sir.

Q. In other words, then, with the exception there was more view there now than there was in March, does it accurately represent the situation and the condition of the area as it existed in February, 1952; is that correct? A. Yes, sir.

Mr. McKevitt: That is as to Exhibit 11?

Mr. Etter: Yes, those are 9, 10 and 11, Mr. McKevitt. I ask that they be admitted.

The Court: Do you wish to examine them?

(Testimony of Ernest Everett.)

Mr. McKevitt: I would like to examine, yes, your Honor.

The Court: Yes.

Voir Dire Examination

Q. (By Mr. McKevitt): Referring, Mr. Everett, to Plaintiff's Exhibit No. 9 for identification, I have agreed that the picture was taken 140 feet from the crossing and toward your home, with the camera in the highway. You understand that?

A. Yes. [77]

Q. Looking in the direction from which the train was coming, the Milwaukee overpass, you understand that? A. Yes, sir.

Q. Now, it is your testimony, is it, that at 140 feet from the crossing here the foliage that is shown there is thicker than it was on March 8th? It is thicker, isn't it?

A. It would be a little thicker.

Q. But you say the foliage as shown there isn't as high as it was in March? A. No, sir.

Q. And how high was it in March?

A. Never measured it, but——

Q. Do you know how high it was?

A. So you couldn't see through there to the underpass.

Q. 140 feet, you couldn't see through there to the underpass? A. Yes.

Q. And that is on March 8th, could you see through there on March 8th to the underpass?

A. No, sir.

(Testimony of Ernest Everett.)

Q. And you couldn't see through there on June 26th to the underpass? A. No.

Q. Well, now, are you telling us that at that distance, [78] 140 feet from that crossing, that some member of the Northern Pacific Railway Company had cut this brush after March 8th.

A. In front here (indicating).

Q. Well, 140 feet back from the crossing?

A. That would be in front where they slashed.

Q. Oh, in front of that distance where they slashed? So, so far as Plaintiff's Exhibit No. 9 is concerned, after March 8th there was no cutting of that brush by any member of the railway company that you know about; is that true?

A. This was halfway back to the Milwaukee, practically.

Q. Yes. In other words——

A. The brush was slashed in front of there. That is where it was (indicating).

Q. Up toward the crossing is where they did the cutting after the accident?

A. Well, yes, you couldn't see through there clear to the crossing.

Q. Well, you know that every spring down there the Northern Pacific Railway Company cuts brush along the right of way?

Mr. Etter: Just a minute. That isn't proper voir dire examination, it is cross-examination.

A. There is a lot of brush there yet, it hasn't been [79] slashed down yet.

Q. (By Mr. McKevitt): Well, to make myself

(Testimony of Ernest Everett.)

clear, you are not telling the Court or jury that in this area shown in Plaintiff's Exhibit 9 for identification, that any of that brush in that area at that distance from the crossing had been cut by the Northern Pacific sometime after March 8th and up to June 26th? You are not telling us that, are you? A. In front it had been slashed.

Q. In front of it, but not in this area shown in the picture?

A. Well, I presume that maybe isn't on the Milwaukee right of way.

Mr. McKevitt: Object to it as incompetent, irrelevant and immaterial.

Mr. Etter: Mr. Everett, it is on the approach, isn't it, along that road within 140 feet?

A. It is along the road.

Mr. McKevitt: Well, now, I object to counsel interrupting my voir dire examination, if the Court please.

The Court: Go ahead.

Mr. Etter: I thought you made an objection. Do you want to make more examination on that?

Mr. McKevitt: I am objecting to that and waiting for the Court to rule. Object to 9 on the grounds it is [80] incompetent, irrelevant and immaterial.

The Court: This, Mr. Everett, is this weeds or brush? A. It is brush.

The Court: It is deciduous brush?

A. Yes.

(Testimony of Ernest Everett.)

The Court: What I mean, it sheds its leaves in the wintertime? A. Yes.

The Court: I see. It will be admitted, then.

The Clerk: That was No. 9, your Honor?

The Court: Yes.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 9.)

Mr. McKevitt: Mr. Etter, Plaintiff's Exhibit 10 has a marking, a writing on the back of it, "Panoramic." You will agree that is not a panoramic photograph? There is only one photograph.

Mr. Etter: Yes, that is only one photograph.

Mr. McKevitt: Well, the "Panoramic" should come off of that.

(Whereupon, Mr. Etter obliterated the said marking.) [81]

Q. (By Mr. McKevitt): Showing you Plaintiff's Exhibit for identification 10, it is understood that the camera was in the center of the road facing the crossing and about 70 feet from the crossing. Is that your understanding?

A. On the county road.

Q. And is it your testimony that the condition that is shown in that picture was the same or substantially similar to the condition on March 8th of '52?

A. There has been more brush slashed in there.

Q. This viaduct there is where the Northern Pacific comes under the Milwaukee, isn't it?

A. Yes, sir.

(Testimony of Ernest Everett.)

Q. And what are these lines along here?

A. That is the railroad track.

Q. That is the Northern Pacific main line, isn't it?

A. Yes, sir.

Mr. McKevitt: I have no objection to that one.

The Court: It will be admitted, then.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 10.)

Q. (By Mr. McKevitt): And with reference to Plaintiff's [82] Exhibit No. 11, that structure that is shown there, that is the Milwaukee overpass, is it not?

A. Yes.

Q. And these dark lines here running in the direction right and left on the picture is the Northern Pacific main line, isn't it?

A. Yes, sir.

Q. And a person, then, sitting in the car where this is shown, looking toward the Milwaukee viaduct, would have that view of the track, would they not?

A. (No response.)

Q. Isn't that true?

A. Yes, sir.

Mr. McKevitt: No objection to that.

The Court: Yes, No. 11 will be admitted.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 11.)

Mr. Etter: This one, as you can see, it is just a car approaching the brush top.

Mr. McKevitt: Where is this now? Is this car facing the way she came up?

Mr. Etter: Yes. [83]

(Testimony of Ernest Everett.)

Mr. McKevitt: The train is over on this side?

Mr. Etter: That's right, there is the Milwaukee overpass right here.

Mr. McKevitt: No, no, here, that is the driver there. Oh, no, this is the driver over here.

Mr. Etter: Yes.

Mr. McKevitt: That's right.

No objection to that.

Mr. Etter: All right.

The Court: That is No. 12. It will be admitted, then.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 12.)

Mr. Etter: This is 13, taken 200 feet back on the approach on the side.

Mr. McKevitt: 200 feet?

Mr. Etter: Yes. It is two-thirds of the way back to the overpass.

Mr. McKevitt: You say the front of the car here is about 200 feet from the crossing?

Mr. Etter: The picture taken 200 feet.

Mr. McKevitt: Oh, the picture. Well, this [84] notation is not correct. 200 feet would indicate that the car is 200 feet.

(Discussion between counsel out of the hearing of the reporter.)

Mr. Etter: Let's put it this way, then.

(Mr. Etter made a further notation on the said exhibit.)

Mr. McKevitt: That is all right.

(Testimony of Ernest Everett.)

Mr. Etter: All right, no objection, then, Mr. McKevitt, to 13.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 13.)

Mr. Etter: No. 12, you haven't heard the witness explain, gentlemen of the jury, is a picture of an automobile facing north, taken by the camera facing south at the grade crossing, and No. 13 is a picture of a car going north to the crossing and the picture was taken 200 feet from the crossing on the county highway looking toward the crossing and from the rear of the car. [85]

Direct Examination (Continued)

Q. (By Mr. Etter): Now, Mr. Everett, on March the 8th of 1952, were you at home that morning? A. Yes, sir.

Q. And were you there in the early part of the afternoon between 2 and 3 o'clock?

A. Yes, sir.

Q. And can you tell us what the condition of the weather was that day?

A. Oh, well, it was a nice morning.

Q. As to visibility? A. Clear.

Q. It was clear? A. Very clear.

Q. I see. Do you recall whether there was any amount of snow around or on the ground?

A. No, I don't believe there was.

Q. You don't believe that there was. And at

(Testimony of Ernest Everett.)

that time, was your daughter, that is, was Erna Mae at home? A. Yes, sir.

Q. And had she been around the home all of that morning? A. Uh-huh.

Q. You will have to speak out, the reporter can't see you [86] nod your head. She had been at home that morning? A. Yes, sir.

Q. All right. Now, at around 2:30 or 2:40, did she take the automobile, take the Dodge?

A. Yes, sir.

Q. And would you tell us what she did just about that time?

A. Well, she came out of the house and wanted to go get the mail.

Q. And do you remember about what time that was?

A. Well, I suppose around a quarter until 3, somewhere along there, I couldn't say exactly.

Q. All right. All right, go ahead then.

A. And so I was working there tearing down an old bridge across the little creek in front of the house, and so——

Q. Just a minute, so the jury can get it, you say there was a creek in front of the house?

A. Yes, sir, a little creek.

Q. You were tearing down the bridge?

A. Yes.

Q. All right.

A. And so I went out to the barn, probably 200 feet, she got in the car and started it, I went out to the barn and opened the gate for her. [87]

(Testimony of Ernest Everett.)

Q. Opened the gate for her. All right?

A. And——

Q. What did you do after she left? Did you stay there, or did you come back?

A. No, I stood there for a little bit. I had been working the road out to the highway or out to the county road, dragging it with a tractor, you know, it was a little muddy, and I stood there. Then I walked out a little bit in the pasture in front of the barn to watch to see if she might slide, you know, around or get stuck or something, but she went right out through it.

Q. All right?

A. Then I stood there and I thought I heard a train coming, and I looked back and I stood there and watched her again and just as she went out of sight of timber by Mr. Klocke's, I could see the train approaching down there by that billboard.

Q. Where was that?

A. Down by the bill sign on the highway.

Q. All right, now, with respect to this diagram, you say you looked over to the sign. Could you tell us where that sign would be with regard to this particular Exhibit 1? At what corner of the sign, toward what corner?

A. Well, it would be on that east corner there.

Q. On this east corner? A. Yes.

Q. And was the sign here on the railroad or over on the highway?

A. Well, it was just across the highway on a parallel from my place, kind of east.

(Testimony of Ernest Everett.)

Q. I see. And where you saw it come into view, was it right by this particular road sign you are talking about? A. Yes, sir.

Q. All right. And you saw the train, did you, going past that sign?

A. As she went out of sight behind this timber.

Q. As she went out of sight behind the timber?

A. Uh-huh.

Q. Where was she going at that time?

A. She was going after the mail.

Q. I mean, what road was she on?

A. On the county road.

Q. And whose property is that that she had approached? You say Mr. Klocke's?

A. By Mr. Klocke's place.

Q. By Mr. Klocke's place. All right. Then will you tell us if anything happened that you recall?

A. Well, then I looked back again and looked to see where [89] the train was and never thought very much about it because I thought she had plenty of time to get across the crossing.

Q. I see. Then will you tell us what occurred?

A. Well, then I stood there for a little bit, and then I thought, "She has had plenty of time to get across," I heard two or three toots of the whistle, sharp toots. Then I waited awhile, the time she should be starting back and she hadn't showed up, so I started up the road afoot, thinking something could have happened.

When I got up there, why, some people met me with the car and took me on up.

(Testimony of Ernest Everett.)

Q. Took you up where?

A. Where she was killed.

Q. Well, where was it, up at the crossing?

A. Yes, sir.

Q. All right. When you got down to the crossing, when you got down to this railroad crossing that afternoon, will you tell us what you saw there at the crossing, Mr. Everett?

A. Well, I saw her laying about 90 feet up above the crossing——

Q. Just a moment. You say 90 feet, you think?

A. Well, about that.

Q. All right, now, you say “above,” do you mean east or west? [90]

A. It would be on the west of the crossing.

Q. This is west direction (indicating).

A. Yes, on the west side of the crossing.

Q. And did you see the train? A. Yes, sir.

Q. Beg your pardon? A. Yes, sir.

Q. And where was the train?

A. It was on up further, up the track further.

Q. Up the track? A. Yes, sir.

Q. Beyond where the body of Erna Mae was?

A. Yes, sir.

Q. How far up, do you have any idea?

A. Well, quite a ways up there from where she was to the train.

Q. When you say quite a ways, you can't estimate it in feet?

A. No, I couldn't exactly.

(Testimony of Ernest Everett.)

Q. I see. And did you go up and look at the train at all? A. No, sir.

Q. You did not? A. I did not.

Q. Did you see the automobile? [91]

A. I saw it after they had—the wrecker had hauled it to town.

Q. You saw it after the wrecker hauled it to town. You didn't see it at that time when you were there?

A. No, sir, I didn't go up.

Q. Beg your pardon?

A. I didn't go up to look at it.

Q. You didn't go up to look at it. All right. And you saw Erna Mae, as you say, was dead?

A. Yes.

Q. All right. Now, some days following, Mr. Everett, did you make some examination or investigation of this particular area?

A. The following day?

Q. No, a few days after the accident, did you make an examination?

A. Well, we went—I went by there every day working. I worked in town, you see.

Q. No, but I mean after this accident, did you make some investigation?

A. Oh, yes, I took a measurement of the crossing there where the planks were, and there was a jump-up, you come up and jump up on the track about five inches. When you come around to make the turn to come up across the track, why, natur-

(Testimony of Ernest Everett.)

ally, the car went up slow, you [92] would have to go slow to cross it.

Q. I see.

A. To make the turn, and I figured that the front wheels went up and the hind wheels hit the plank and that is what stalled the car.

Q. Well, did you see——

Mr. McKevitt: I object to that, if your Honor pleases, and move it be stricken.

The Court: Yes, I think so.

Mr. McKevitt: And the jury instructed to disregard it.

The Court: The opinion of the witness should be stricken and the jury is instructed to disregard it.

Q. (By Mr. Etter): Mr. Everett, you can't give an opinion, you can just tell the jury what you found.

The Court: Tell the situation, what is a physical fact.

Q. (By Mr. Etter): The situation, what you saw, don't give them any opinion.

Are you talking about the roadway as it approached the railroad tracks at the crossing? Is that what you were describing? A. Yes, sir.

Q. And handing you here Plaintiff's 6 for identification, the crossing itself, now what area were you referring [93] to that you say you measured?

A. Well, it was right along the side of the plank.

(Testimony of Ernest Everett.)

Q. Now, you are pointing to the outside, the plank on the outside of the rail? A. Yes, sir.

Q. Isn't that correct?

A. Where the gravel had been kind of dug away.

Q. The gravel and the ballast, you mean, leading up to that bank? A. Yes, sir.

Q. You say you measured, what did you measure?

A. I measured the depth of the plank. They are four-inch plank, rough plank, and it was dug out below them some.

Q. It was dug out below them. You mean there was an area dug out below that plank?

A. Yes.

Q. Do you know how far that dug-out area extended north, or rather—yes, extended out on the highway in the direction of your place? Do you know how far that dug-out part extended?

A. I imagine it would be a few feet there on account of making that turn in the road. You know how a car will kind of dig it up when they make that turn.

Q. I see. All right, now, did you do anything else with [94] respect to your investigation shortly after this accident? Did you check any distances, let's put it that way?

A. Oh, yes, we checked the distance from that sign board down on the highway to the crossing.

Q. To the crossing. Now, you are referring, are you—

(Testimony of Ernest Everett.)

A. Down on the highway.

Q. —to the sign board which you were telling the jury about which you would place in the area east and beyond the public highway?

A. Yes, sir.

Q. Is that the sign board you are talking about? You say you took the distance to that sign board from the railroad crossing? A. Yes, sir.

Q. The grade crossing where this accident occurred? A. Yes, sir.

Q. How far is that, how far was that sign?

A. That was a mile and three-tenths.

A. A mile and three-tenths. All right, tell me this, since the time that you measured that, have you rechecked that distance? A. Yes, sir.

Q. When did you do that?

A. Last Friday. [95]

Q. Last Friday. And who was present when that was rechecked as to distance?

A. Mr. Etter and Mr. Connelly there and Mr. Klocke.

Q. Mr. Klocke. And you? A. Yes, sir.

Q. Four of us, is that correct? A. Yes.

Q. And what was the distance that was checked or did you see that distance checked?

A. A mile and three-tenths.

Q. And how many times was it checked?

A. Twice.

Q. And how? A. By a car.

Q. I see. All right, and did you make any—

(Testimony of Ernest Everett.)

shortly after this accident occurred, did you check any other distances? A. Yes.

Q. And what other distances did you check?

A. Checked the distance from where she went out of sight by Klocke's until she got to the railroad track.

Q. Where Erna Mae, you mean?

A. Crossing.

Q. On the county road, where she went out of your sight? A. To the crossing. [96]

Q. Behind the trees at Klocke's to this grade crossing? A. Yes, sir.

Q. All right, and what was the distance you found there?

A. Three-tenths of a mile.

Q. Three-tenths of a mile. And you did that shortly after this accident? A. Yes, sir.

Q. And kept those measurements?

A. Yes, sir.

Q. Will you tell me whether that measurement has been rechecked? A. Yes, sir.

Q. That is the measurement from Klocke's place down to the highway? A. Yes, sir.

Q. And when was it rechecked?

A. Last Friday.

Q. And who was there?

A. Mr. Etter and Mr. Conner—

Q. Connelly.

A. Connelly, Mr. Klocke and me.

Q. I see. And what was the measurement that it checked out?

(Testimony of Ernest Everett.)

A. That was three-tenths of a mile.

Q. Three-tenths of a mile. Now, when Erna Mae left that [97] morning, had she driven down there before?

A. Yes, sir.

Q. I see. And could you estimate, could you tell her speed?

A. Well, I figured it was around 25 to 30 miles an hour.

Mr. McKevitt: I think the point should be fixed where he is talking about the speed, if your Honor please.

The Court: Yes.

Q. (By Mr. Etter): When you observed her car traveling in the direction down the county road toward Klocke's and before it disappeared from view, did you have a chance to observe it?

A. Yes, sir.

Q. And did you have a chance to observe the speed? Could you see the speed or approximately at which she was traveling?

A. Well, I figured it was around 25 or 30 miles an hour.

Q. You figured it was about that?

A. Uh-huh.

Q. You watched her drive it before?

A. Yes, sir.

Q. Had you driven with her?

A. Yes, sir.

Q. And she had driven with you. And you had watched her before, had you?

A. Yes, sir.

Q. And it is on that basis you make this estimate?

A. Yes.

(Testimony of Ernest Everett.)

Q. What did Erna Mae do around the home place, Mr. Everett? Did she help out around the home place?

A. Well, she helped me most all the time when she was out of school.

Q. And in what way?

A. Well, she done plowing, 30 acres, of that spring we had the plow.

Mr. McKevitt: Did what?

A. We had to plow.

Mr. Etter: About 30 acres of plowing during the spring.

A. During her school vacation.

Q. Could she operate the tractor?

A. Yes, sir.

Q. And the other mechanized equipment on the farm?

A. Raked hay, mowed the hay.

Q. I mean, did she work right along with you?

A. Yes, sir.

Q. During the summer and spring vacations?

A. Yes, sir.

Q. She did. On the farm, doing farm work. All right. Do you know whether or not she had ever worked out? Did she work out? [99]

A. Well, she had before she came, she used to drive a tractor back there for the neighbor when he was hauling hay into the barn, you know.

Q. Had she ever worked for Mr. Klocke, do you know?

(Testimony of Ernest Everett.)

A. Well, she had been up there an awful lot of the time.

Q. Been up there. Now, had you been over this crossing yourself sometime prior to this accident?

A. Yes, sir.

Q. Had you been over it?

A. The day before. The day before, we were in town on Friday.

Q. The day before you had been in town on Friday. Now, will you describe to the jury, aside from the pictures that are here, the approach and the view that you have as you come around? Will you tell them whether there are curves, or just what is the approach along that highway as you turn across that grade crossing to go to Ellensburg? Will you just describe to the jury in your own words just immediately before this accident happened on Friday?

A. I always pull up there and slow down, shift down or something, to get up over that thing, because——

Q. You mean——

A. Shift down, it was a sharp bend coming up over and [100] hitting them plank, you had a very good chance of stalling your car if you didn't.

Q. What do you mean there is a sharp bend?

A. Well, you come up along parallel with the railroad, then you have to turn right up and cross the crossing.

Q. I see. Did you cross the crossing on a turn, or was there a straight or direct approach to it?

(Testimony of Ernest Everett.)

A. Turn across it on a turn. That is the reason you had to practically slow down at the crossing.

Q. I see. And had you crossed the crossing a number of times before that? A. Yes, sir.

Q. And what was the condition, generally, of the approach next to that planking? Was it good or was it bad?

A. I would say it was bad.

Mr. McKevitt: Object to the form of that question. He can describe the condition.

The Court: Yes, I will sustain the objection.

Q. (By Mr. Etter): All right, what was the condition during the times you had been using it?

A. I would say it was bad.

Mr. McKevitt: Object to that and move that the answer be stricken and the jury instructed to disregard it.

Mr. Etter: He can certainly say what he thought about it. [101]

The Court: Well, I think he should describe it. "Bad" doesn't mean anything.

Q. (By Mr. Etter): Tell us.

A. The gravel had been dug out from the cars, you see, in making that bend and had made—and that made a jump-up to get up on the railroad.

Q. A jump-up to get up on the crossing? How do you mean, now, a jump-up?

A. Well, you know, you had to hit them plank and, naturally, you would have to goose your car in order to hit them and make the turn beside.

(Testimony of Ernest Everett.)

You couldn't go across 40 miles an hour because you had to stop and pretty near make a turn.

Q. I see, to go over it? A. Yes.

Q. What was the condition, when you had driven over it the day before, as to visibility up to see a train coming the other way or coming up from under the underpass from the east to Ellensburg?

A. Very hard to see a train until you got on the crossing.

Q. And why was that?

A. Because you was going right with the railroad, parallel to the railroad track.

Q. Yes? [102]

A. You couldn't—

Q. And what else? What was the condition of the brush around and along the right of way?

Mr. McKevitt: On what particular day?

Q. (By Mr. Etter): On the day before this accident happened, when you drove to town?

A. It has been bad, been bad all the time.

Mr. McKevitt: I object to that answer, if your Honor pleases, and move the jury be instructed to disregard it.

Mr. Etter: You can't say it is bad; tell us what it looked like.

The Court: The jury will disregard the statement that was made that it was "bad." He can state in detail why he considered it bad.

Q. (By Mr. Etter): Give your opinion.

A. Grewed up with brush.

Q. Beg pardon?

(Testimony of Ernest Everett.)

A. Grewed up with brush all along there.

Q. I didn't hear you, Mr. Everett?

A. I say it grewed up, the brush along the right of way there.

Q. The brush had grown up, is that it?

A. Yes, made it harder.

Q. Could you see with ease through there back up to the [103] underpass or overpass on the day prior to this accident?

A. You could see if you got up on the crossing.

Q. I see.

Mr. McKevitt: What was that answer?

Mr. Etter: You couldn't until you got on the crossing.

Q. That was the condition on the day before the accident when you drove over there?

A. Yes, sir.

Q. Beg your pardon? A. Yes, sir.

Q. I see. Now, had these conditions, that is, the condition of the planking and the visibility with respect to the brush, had that existed there for sometime?

A. I suppose it had, been there ever since I had been there.

Q. I see. Well, now, tell me this, were there any signs, were there any signs——

A. Road signs?

Q. Road signs—just a moment—either on the south side, any road signs on the south side away and off of the main crossing indicating the pres-

(Testimony of Ernest Everett.)

ence of a grade crossing ahead on the day prior to this accident? [104]

A. What do you mean, what kind of signs?

Q. Well, any crossing signs saying "Railway Crossing Ahead"?

A. There was a railroad crossing sign there.

Q. Beg pardon?

A. There was a railroad crossing sign there. There was no stop signs.

Q. But what I am trying to get at, where was the railroad crossing sign at the crossing?

A. At the crossing.

Q. Yes, I am asking if there were any signs down toward your place? A. Oh, no, no.

Q. 20 or 30 or 40 feet along this highway, indicating that there was a railroad crossing ahead?

A. No.

Q. Beg your pardon? A. No.

Q. Where was the only sign?

A. The railroad sign on the other side of the crossing, and that was all.

Q. I see.

The Clerk: Marking Plaintiff's 14, 15 and 16 for identification, your Honor.

Q. (By Mr. Etter): Handing you the Plaintiff's Exhibit [105] No. 14 for identification, without going into details, will you tell me what that represents? A. Funeral expenses.

Q. Funeral expenses. That you and Mrs. Everett paid as a result of her death? A. Yes, sir.

(Testimony of Ernest Everett.)

Mr. McKevitt: If you will show them to me, Mr. Etter, maybe we can agree.

Mr. Etter: All right.

(Exhibits handed to Mr. McKevitt.)

Mr. McKevitt: No objection.

The Court: They will be admitted, then. Does that apply to 14, 15 and 16, then?

Mr. Etter: Yes, your Honor, 14, 15 and 16.

(Whereupon, the said bills were admitted in evidence as Plaintiff's Exhibits Nos. 14, 15 and 16.)

Mr. McKevitt: What do they total?

Mr. Etter: 14, 15 and 16. The 14 is \$463.60;
15—

Mr. McKevitt: What is that for?

Mr. Etter: Funeral expenses.

Mr. McKevitt: Funeral. [106]

Mr. Etter: And grave markers, \$267.50; stone and cemetery lot, \$101.66.

Mr. McKevitt: \$101.66?

Mr. Etter: That is correct.

Q. The Dodge truck that you had, Mr. Everett, were you able to realize anything on that truck after the accident? A. No, sir.

Q. Was it written off, or, rather, did you charge it off as a total loss?

A. It was a complete wreck.

Q. It was a complete wreck. You had had it how long, did you say?

A. Well, I got it in the fall of '50 before I came out here.

(Testimony of Ernest Everett.)

Q. The fall of what? A. '50.

Q. Before you came here?

A. Yes, to move out with.

Q. I see. What was its mechanical condition so far as your using it was concerned?

A. Seemed to run pretty good.

Mr. McKevitt: I didn't get the answer?

A. It run pretty good. I used it going to work all the time, back and forth to work. [107]

Q. (By Mr. Etter): You had used it continuously, had you?

A. Yes.

Q. Up until the time it was destroyed?

A. Yes.

Mr. Etter: I think that is all at the present, Mr. Everett.

The Court: Just a moment. There will be some cross-examination.

Mr. McKevitt: May I proceed with cross-examination?

The Court: Yes, you may proceed.

Cross-Examination

Q. (By Mr. McKevitt): Mr. Everett, with reference to the condition of the crossing itself, the planking, do I understand that the day following the accident you made some observations about its condition; is that correct?

A. I went to town the day before.

Q. Pardon?

(Testimony of Ernest Everett.)

A. I had crossed it the day before on the Friday.

Q. You went back and made some measurements, I understood?

A. Oh, yes, afterwards.

Q. When was that, please?

A. About a week afterwards.

Q. About a week afterwards? [108]

A. Somewhere along there.

Q. Did you make any observation of the planking condition when you went up there immediately following the unfortunate death of your daughter, that day?

A. Measured the plank with a ruler I had in the car there.

Q. At that time? A. At that time, yes, sir.

Q. What you are talking about is the planking on the outside of the rail, aren't you?

A. Yes, sir.

Q. Toward your home? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And the width of the planking was what; that is, outside planking, what was the width that you measured it?

A. Well, I think they are around about 14 inches, the planks. Oh, you mean the thickness?

Q. The thickness?

A. Oh, yes, four inches.

Q. Four inches, and about 14 inches wide?

A. Yes.

Q. Now, you say that some dirt on that plank-

(Testimony of Ernest Everett.)

ing, that outside planking, had been kicked away so there was some [109] kind of a depression as you went over it; is that correct? A. Yes.

Q. And did that depression extend the full length of this outside planking? A. Yes, sir.

Q. And you made a very thorough examination of the planking on that day? A. Yes.

The Clerk: Defendant's 17 and 18 for identification.

Mr. McKevitt: Now, with reference to Defendant's Exhibits 17 and 18 for identification, I have shown these to Mr. Etter and I think I am correct in saying that he will stipulate there is no necessity for their identification and that they were also taken on the 10th of March, two days after the accident.

Mr. Etter: That is correct, and I so stipulate and have no objection.

The Court: All right.

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit 17, will you please examine that?

A. This was taken——

Q. The camera is east of the crossing, showing a close-up of the crossing and view to the west. That is looking toward the west, you see. [110]

A. Looking to the west?

Q. Yes.

A. This would be on the west side, is that it?

Q. Well, you are looking——

A. Well, we are looking west, but this is the approach on this, going——

(Testimony of Ernest Everett.)

Q. Yes.

A. —going north?

Q. On the left-hand side of the photograph, you are going north away from your house.

A. Yes, I see, uh-huh.

Q. Is that a fair representation of the condition of that crossing as it existed on March 8th of 1952?

A. I would say maybe a fair, yes.

Q. Well, is it a good representation of the condition that existed on that date, two days after the accident, it was taken, this photograph, it happened this photograph was taken?

A. Plain view, that is a very plain view, very plain.

Q. You would say it is a fair representation?

A. Yes.

Mr. McKevitt: Offer it as part of the cross-examination of this witness.

The Court: That is 17, isn't it?

Mr. McKevitt: Yes, your Honor. [111]

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 17.)

Mr. McKevitt: May I offer it to the jury and pass it along?

Mr. Etter: Well, counsel, I was going to suggest, I thought we would try to get all of these pictures in and if we could agree to let the jury take 15 minutes in the morning and look at all

(Testimony of Ernest Everett.)

the pictures so we don't have to keep passing them around. I didn't do that because I thought it would be slower. I have a whole bunch of them.

Mr. McKevitt: I will abide by whatever his Honor thinks is necessary to expedite the trial.

Mr. Etter: I should like to get an agreement from you on that to expedite the matter. When we have all the exhibits in, the jury may have an opportunity while we are not in the middle of an examination to avoid distraction by examining them all.

The Court: I think there are disadvantages to that, too. If you wait too long after the explanatory testimony is given, it is going to be difficult for the jurors to remember which picture is which and what it represents, so I [112] think if either counsel wishes to, just start in and pass them all around and take the time to do it.

Mr. Etter: All right, your Honor, I think I will do that.

The Court: The order in which they are numbered there, if that is the order you want them to go around.

(All photographic exhibits handed to jury.)

Mr. McKevitt: I will wait this examination by the jury, then.

The Court: Yes, I think that perhaps that would be the most orderly way, just give the jurors an opportunity to look at them one at a time and pass them along.

Mr. Garber, if you will just look at them and

(Testimony of Ernest Everett.)

then as you have finished with one, pass it along, we will keep them moving that way.

Mr. Etter: I might tell the jury, as to my photographs, if they will look on the back, they can tell what the photograph is about, and Mr. McKevitt has appended to his the direction that I have agreed may stay on there for the jury's guidance.

The Court: I see. If there is some explanatory matter on the back, I think they may look at it.

Mr. McKevitt: Is the jury finished, your Honor?

The Court: You may proceed when you are ready.

Mr. McKevitt: I was waiting, I didn't know the jury is finished. [113]

The Court: The back row haven't quite finished.

Mr. McKevitt: Shall I wait?

The Court: Yes, might as well wait.

All right, Mr. McKevitt, you may proceed.

Mr. McKevitt: Thank you, your Honor.

The Clerk: Your Honor, these defendant's photographs that I have now marked commence with No. 19 and end with No. 31.

The Court: What was 18?

The Clerk: 18 is one of the others.

Mr. McKevitt: I am getting to 18 right now.

The Court: All right. And how far do they go?

The Clerk: Through 31.

The Court: All right.

Mr. McKevitt: Offer as part of the cross-examination of this witness Defendant's Exhibit 17 for identification.

(Testimony of Ernest Everett.)

Mr. Etter: No objection.

The Court: It has been admitted.

Mr. McKevitt (To the jury): You can pass that along, if you will.

Q. Showing you Defendant's Exhibit No. 18 for identification, your counsel has stipulated that that photograph was taken March 10th, two days after the accident, and [114] in that the camera is west of the crossing and facing toward the east.

Now, will you examine that, please?

A. That is on the west side of the crossing?

Q. The camera is west of the crossing and looking toward the east.

A. Toward the underpass?

Q. That's right.

A. Where is the camera sitting?

Q. Well, it is in about the center of the track. Is that a fair representation? A. Yes.

Q. Of the condition of that crossing as it existed on March 8th?

A. From the center of the track, not from the approach of the track.

Q. I am talking about the outside planking?

A. It is taken from the center of the track?

Q. That's right. A. Yes, sir.

Q. That is a fair representation?

A. Yes, sir.

Mr. McKevitt: Offer it as part of the cross-examination of this witness.

The Court: It will be admitted, then. That is 18, [115] isn't it?

(Testimony of Ernest Everett.)

Mr. McKevitt: Yes, your Honor.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 18.)

Q. Now, Mr. Everett, if I understood your testimony correctly, you stated that one approaching that crossing that date, as your daughter did, would not have any view of that track toward the east, toward the viaduct, until the truck got where, how far from the crossing? Did you say almost on it?

A. Almost on it.

Q. Well, do you mean on it, or what do you mean by almost?

A. Well, practically on the crossing.

Q. Well—— A. The approach.

Q. Assuming the front end of the truck was 10 feet from the nearest rail, what view toward the Milwaukee viaduct would one have if they looked in that direction? How far up the track could they see if the front end of the truck was 10 feet from there on into the crossing, how far up the track could they see on March 8, 1952? [116]

A. To the east?

Q. Yes, the direction from which this train came?

A. Well, you couldn't see very far.

Q. Well, could you see any distance up the track?

A. Might see a little ways, probably.

Q. You have in mind, now——

A. Because you was still on the turn.

(Testimony of Ernest Everett.)

Q. Understand my question——

A. You are still making the turn.

Q. Assuming that on March 8, 1952, you were driving this Dodge truck and you stopped it with the front end of the truck 10 feet from the closest rail and you looked to the east, how far up that track could you see, if you could see up the track at all?

A. Well, if you stopped and looked, twisted your head around and looked, you probably could see up there quite a little ways.

Q. Well, when you are 10 feet from the track, the approach, as you will notice by this map, is almost at right angles, isn't it, to the track?

A. In crossing the track at 10 feet, huh?

Q. When you are 10 feet from the track, you are almost at right angles to the track, is that right?

A. Well, I suppose you was making a right angle at that distance. [117]

Q. Well, now, you stop your truck 10 feet from that track—she was going north, wasn't she?

A. Yes.

Q. And that train is coming from the west, isn't it?

A. From the east.

Q. From the east? A. Yes.

Q. So what she would be doing driving north, she would look to the east. Now, if when she got 10 feet from that, with the front of her truck 10 feet from the track, she looked in that direction, she could have seen that train clear back beyond

(Testimony of Ernest Everett.)

the Milwaukee viaduct, couldn't she? You know that to be the fact? A. I don't think so.

Q. You don't think so. And isn't—

A. Because you was coming up a raise there to make that bend.

Q. I am assuming all of the conditions that existed there on March 8, 1952, and you said you had been over the track the day before it, hadn't you?

A. Yes.

Q. In this truck? A. Yes.

Q. The same truck. And the conditions on March 7th were the same as they were on March 8th, weren't they? [118] A. Yes.

Q. Well, assuming that on the day before you were driving that truck, isn't it a fact that when the front end of your truck gets 10 feet from the closest rail, you can see up that track over a thousand feet, can't you?

A. Well, I never measured it, I couldn't say just how far you can see up there.

Q. Can you see 500 feet up the track?

A. If you get on the crossing, you can see the whole length of the track.

Q. I am not talking about that, I am talking with the front end of the truck 10 feet from the closest rail. A person in that Dodge truck, sitting where she was sitting, could see up that track at least a thousand feet or more, couldn't they?

A. Well, I couldn't say to that just how far you could see.

Q. Can you give the jury any idea, under those

(Testimony of Ernest Everett.)

conditions, how far you could see up that track, if at all?

A. I know when you get on the crossing, you can see the whole length of the track. Probably if you got your front wheels on it, you could see.

Q. Well, then, I won't pursue it. Are you unable to answer, under the conditions I have described, when the front end of the truck is 10 feet from the closest rail? [119]

A. When you are making a bend, it is pretty hard to turn your head and look back.

Q. But you are not making any bend when you are 10 feet from the track, you are almost at right angles to the track. A. At ten feet?

Mr. Etter: Just a minute, just a minute. You are assuming something that isn't in the proof and isn't on the map, Mr. McKevitt.

Mr. McKevitt: Look at the map.

Mr. Etter: Go look at it.

The Court: Proceed with the examination.

Q. (By Mr. McKevitt): One inch on the map, Mr. Everett, equals 20 feet on the ground. Isn't it a fact when the truck comes up there and its front end is 10 feet away, it is almost at right angles to the railroad track? A. At 10 feet?

Q. Yes. A. According to that map.

Q. Well, all right, then, the train is coming in this direction, the truck is going in that direction. All she would have to do is turn her head to the right and she can see up that track on that date for over a thousand feet, with the front end of

(Testimony of Ernest Everett.)

that truck 10 [120] feet from the closest rail? Now, isn't that the fact? A. (No response.)

Q. Pardon me?

A. I couldn't say, I never measured just how far you could see.

Q. And isn't it a fact that when a driver such as she was on that date, that when she is 20 feet from that rail, by a slight turn of her head she has a clear view up that track clear to the Milwaukee underpass and further, isn't that right, at 20 feet?

Mr. Etter: I am going to object to the form of these questions. He might ask him about his experience. These assumptions about if she turned her head slightly is without any definition of slight or anything else on those hypothetical questions. I have no objection to him asking Mr. Everett if he was driving and he turned such and could or could not see, but I don't know how we could assume—

The Court: Well, I think that objection is well taken.

Q. (By Mr. McKevitt): Well, assuming then, that the day of this accident you were driving that same truck, isn't it a fact that when the front end of that truck was 20 feet from the closest rail, that there is no obstruction to view up that track clear to the Milwaukee viaduct and further? Now, that is the truth, isn't it? [121]

A. I wouldn't say that.

Q. Well, can you give us any idea?

A. Still making a bend, you can't see when you

(Testimony of Ernest Everett.)

are making a bend until you start across the track.

Q. Is it your——

A. You are below the track when you——

Q. Is it your testimony that before anyone could have seen that train approaching on that date, that a portion of that truck had to get on the closest rail? Is that your testimony?

A. Before you could see, you mean?

Q. Yes, before you could see the engine?

A. I imagine the front end would have to be on that rail.

Q. I want to show you Defendant's Exhibit No. 20 for identification, or No. 19, rather, and it is agreed that the camera in that instance was 250 feet east of the crossing, sec. That is looking in the direction in which the train was going, 250 feet east of the crossing, and it is facing west. Now, that is a fair representation of the condition of the track and the vegetation on either side there, isn't that true? A. Yes.

Q. Isn't that correct?

Mr. McKevitt: Offer it as part of the cross-examination of this witness. [122]

Mr. Etter: Let me take a look at it, just a minute.

I have no objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 19.)

(Testimony of Ernest Everett.)

Q. (By Mr. McKevitt): Examine Defendant's Exhibit No. 20, and it is agreed between counsel and myself that at that point the camera is 300 feet east of the crossing facing west. That is a fair representation of the track and the vegetation as it existed on March 8, 1952, the date of the accident, is it not? A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: It will be admitted, Defendant's 20.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 20.)

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit [123] No. 21 for identification, it is agreed between your counsel and myself that was taken, all these photographs, two days after the accident happened. There the camera is 350 feet east of the crossing and facing west. That is a fair representation of the track and the conditions on either side, is it not, as they existed on the day of the accident? A. Yes.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 21.)

Q. (By Mr. McKevitt): Showing you Defend-

(Testimony of Ernest Everett.)

ant's Exhibit No. 23 for identification, it is stipulated between us and your counsel that there the camera is 450 feet east of the crossing facing west. That is a fair representation of the conditions existing on that date, track and on either side, is it not?

A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection. [124]

The Court: It will be admitted.

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit 23, and it is stipulated that was also taken two days after the accident——

The Court: You mentioned that last one as 23. I wondered if you had intended to skip 22?

Mr. McKevitt: 22, your Honor, I made a mistake, that last one was 22.

The Court: That was 22 and now you have 23. All right, 22 will be admitted, then.

Mr. McKevitt: I beg your pardon, this is 23.

The Court: Yes, all right.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 22.)

Q. (By Mr. McKevitt): That is a fair representation of the conditions that existed on that date, is it not? A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: It will be admitted. [125]

(Testimony of Ernest Everett.)

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 23.)

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit 24 for identification, it is stipulated the same, the camera there is 500 feet east of the crossing facing westward, taken two days afterwards, and that is a fair representation of the conditions that existed on the date of the accident, is it not? A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: I have no objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 24.)

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit No. 25 for identification, it is stipulated that the camera there was 600 feet east of the crossing facing westward. That is a fair representation of the conditions existing on the day of the accident, is it not? A. Yes, sir. [126]

Mr. McKevitt: Offer it in evidence.

Mr. Etter: I have no objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 25.)

Q. (By Mr. McKevitt): Showing you Defend-

(Testimony of Ernest Everett.)

ant's Exhibit No. 26, and it is stipulated that that was taken two days after the accident and the camera is 700 feet east of the crossing facing westward, and that is a fair representation, is it not?

A. Yes, sir.

Q. And those structures on either side are the sidewalls of the Milwaukee underpass, are they not?

A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: That was 26, wasn't it?

Mr. McKevitt: 26, your Honor.

The Court: It will be admitted, then.

Mr. Etter: Yes, 26, your Honor. [127]

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 26.)

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit for identification 27, it is stipulated that was taken two days after the accident, the camera 900 feet east of the crossing. That is a fair representation, is it not, of the conditions existing that day?

A. Yes, sir.

Q. And the structure there shown *in* the Milwaukee overpass, is it not?

A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: It will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 27.)

(Testimony of Ernest Everett.)

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit No. 28 for identification, and in that picture the camera is 1,000 feet east of the crossing facing westward, that is a fair representation of the conditions, is it not? [128] A. Yes, sir.

Q. On the date of the accident. And that also shows the Milwaukee overpass, doesn't it?

A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: 28 will be admitted.

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 28.)

Q. (By Mr. McKevitt): Defendant's Exhibit No. 29 for identification, the camera 1,400 feet east of the crossing facing westward, and that is a fair representation of the conditions that existed on the day of the accident? A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: 29 will be admitted.

Mr. Etter: Oh, pardon me just one moment. Yes, no objection. [129]

(Whereupon, the said photograph was admitted in evidence as Defendant's Exhibit No. 29.)

Q. (By Mr. McKevitt): Showing you the Defendant's Exhibit No. 30 for identification, which

(Testimony of Ernest Everett.)

is a panoramic view, a combination of several pictures, 1, 2, 3 and 4 are several pictures facing east and north, camera 25 feet south of the crossing, will you examine that panorama, please, having in mind this is the direction in which your daughter is traveling (indicating)?

A. The camera was 25 feet——?

Q. The camera is 25 feet from the crossing.

Mr. Etter: All four pictures in the panoramic view, Mr. McKevitt?

A. The camera was in here, then (indicating)?

Q. (By Mr. McKevitt): Yes, 25 feet. Isn't that a fair representation of the conditions that existed on that date?

A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Q. Now, showing you Defendant's Exhibit 31, which is a panoramic view consisting of three pictures and the camera is 180 feet south of the crossing, looking east and north. Will you examine that? It was taken two [130] days after the accident. Is that a fair representation of the conditions that existed on the day of the accident?

A. Yes, sir.

Mr. McKevitt: Offer it in evidence.

Mr. Etter: No objection.

The Court: All right. 30 and 31 will be admitted, then.

(Whereupon, the said photographs were admitted in evidence as Defendant's Exhibits Nos. 30 and 31.)

(Testimony of Ernest Everett.)

Mr. McKevitt: May I go into another subject?

The Court: I think I will just wait until the jury gets through looking at these pictures and then adjourn.

Mr. McKevitt: Very well, I won't go into it.

The Court: All right, members of the jury, I am going to excuse you until 10 o'clock tomorrow morning. Report back at 10 o'clock tomorrow morning for resumption of the trial, and please remember what I have told you about not discussing the case, either among yourselves or with anyone else. Just refrain from reading anything about it in the papers or any account of it on the radio. [131]

You may be excused now.

(Whereupon, the following proceedings were had out of the presence of the jury:)

The Court: It has been my practice to instruct the jury on damages that they can't award more than the amount claimed in the complaint. I have never been sure whether that applied to detailed amounts of special damages claimed, but I notice here, according to my calculation, your total amount for funeral expenses exceeds the amount claimed in the complaint, does it not? I think you allege in the complaint \$731.10, and my computation of your three items here is \$832.76.

I suggest, if you wish to claim the larger amount, that you amend the complaint by interlineation.

Mr. McKevitt: I would have no objection to the

amendment conforming to the bills that Mr. Etter has put in.

Mr. Etter: I will make that formal motion, then, that it be amended.

The Court: Yes. I suggest you better add those up or have the Clerk add those and put it in by interlineation in the complaint.

Mr. Etter: All right, your Honor.

The Court: That would be more accurate, probably, than my arithmetic. [132]

I am going to suspend this case until 10 o'clock, but I have another short matter to take up before that, so I will adjourn until 9:45 tomorrow morning.

(Whereupon, the trial in the instant cause was adjourned until 10 o'clock a.m., Tuesday, January 18, 1955.) [133]

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to-wit:)

Mr. McKevitt: May I proceed, your Honor?

The Court: Yes.

ERNEST EVERETT,

plaintiff herein, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination (Continued)

Q. (By Mr. McKevitt): Mr. Everett, I believe you testified yesterday that Erna Mae was, at the time of her death, 16 years of age?

(Testimony of Ernest Everett.)

A. Yes, sir.

Q. And that she would have been 17 in April, the following month? A. Yes, sir.

Q. And she was born in Kalispell, Montana?

A. Yes, sir. [134]

Q. And you lived over there for how long?

A. I lived there practically all my life.

Q. Oh, you were a native of Montana?

A. Well, I was born in Texas, but I was about five years old when we came there.

Q. Well, you moved your family from Kalispell, do I understand you, direct to Ellensburg?

A. Yes, sir.

Q. And you arrived at Ellensburg, established your residence where you now reside, in 1950?

A. Yes, sir.

Q. In November of that year?

A. Well, I got here in October, I believe it was.

Q. In October?

A. I moved out there in November.

Q. And you have lived there continuously since that time? A. Yes, sir.

Q. Living there now? A. Yes, sir.

Q. Now, when you established your residence at Ellensburg, where did Erna start going to school?

A. At Ellensburg.

Q. In the fall of 1950? A. Yes, sir.

Q. In the high school? [135] A. Yes, sir.

Q. Now, how would she get to school? That is about four miles from Ellensburg, isn't it?

A. She took the bus from the highway there.

(Testimony of Ernest Everett.)

Q. That is the highway which parallels the railway crossing? A. Yes, sir.

Q. But in order to get to the highway, she would have to go over that railroad crossing, wouldn't she? A. Yes, sir.

Q. So she, for a period of a year and a half, that is, November of 1950 to March of '52, that period, she would go over that crossing at least twice a day when she was going to school?

A. Yes, sir.

Q. How would she get from her home to the highway?

A. Well, lots of times they walked and bad weather I would take them.

Q. When it was bad weather, you would drive her down in the car from the home, go up this road and over the crossing; is that correct?

A. Yes, sir.

Q. And then she would meet the bus. And you knew at all times, did you not, that from the time you established your residence there, that that was the main line of [136] the Northern Pacific Railway Company? A. Yes, sir.

Q. And you knew that it operated passenger trains and freight trains over that crossing day and night? A. Yes, sir.

Q. You knew that at the time?

A. Yes, sir.

Q. Your daughter knew it, also, didn't she?

A. Yes, sir.

(Testimony of Ernest Everett.)

Q. The weather on this particular day, March 8, '52, was clear, was it not? A. Yes, sir.

Q. No snow? A. No.

Q. No rain, visibility was good?

A. Yes, sir.

Q. Generally. You knew for a considerable period of time prior to this accident that that Northern Pacific passenger train went over that crossing somewhere between 2:30 and 3 in the afternoon; you knew that? A. Yes.

Q. Your daughter knew it?

A. Well, I suppose she did, I don't know.

Q. Well, weren't there occasions when you and she would be approaching that crossing prior to this date that [137] you would see that passenger train go by?

A. Well, it wouldn't be very often, if we did at all, because their school period wouldn't be connected at that time of day.

Q. This Dodge truck, you say, was a 1950 panel—1940? A. '40.

Q. Model. A panel truck? A. Yes, sir.

Q. Regular gear shift? A. Yes, sir.

Q. And you purchased that in 1950?

A. Yes, sir.

Q. Did you purchase it down at Ellensburg?

A. In Kalispell.

Q. Oh, you drove——

A. I drove it through.

Q. From Kalispell over? A. Yes.

(Testimony of Ernest Everett.)

Q. How many miles were on that truck at the time you bought it, do you recall?

A. Well, I don't remember, it was around—I couldn't say right offhand.

Q. It was about 10 years old when you bought it, is that correct?

A. I could say that they had a reconditioned motor in it. [138]

Q. Well, but it was 10 years old when you purchased it? A. Yes.

Q. And you purchased it from a second-hand dealer?

A. It was a dealer there, used car dealer, yes.

Q. But you don't recall what the mileage was on the truck when you bought it?

A. No, I couldn't say right now.

Q. It had been used considerably, had it not?

A. Well, it had been used quite a bit, it was 10 years old.

Q. You said it had a reconditioned motor in it?

A. Yes.

Q. When was that put in?

A. Well, it had about 8,000 miles when I got it—no, about 10, because I had to put the block number on after I got here in order to get the license off the old one.

Q. It wasn't a new motor, it was a reconditioned motor?

A. Well, I suppose it would be what you would call a reconditioned motor.

Q. Keep your voice up, it is rather hard to hear,

(Testimony of Ernest Everett.)

Mr. Everett. It was a reconditioning of the old motor?

A. It would be an old motor.

Q. Is that correct?

A. Well, it would be what you would call a new motor, wouldn't it, worked over? [139]

Q. I see. Well, all right. Now, on this particular afternoon of March 8th and before Erna started to get the mail in that truck, where were you working?

A. Well, I was tearing out an old bridge just out in front of the house.

Q. Now, your house sits back from that county road, does it not? A. Yes, sir.

Q. That is, toward the Ellensburg side, isn't that right? A. Yes.

Q. And how far back does your house sit from the county road?

A. Well, I estimate somewhere near a quarter of a mile.

Q. A quarter of a mile?

A. Somewhere along there.

Q. And you have a fence, do you not, right near the county road? A. Yes, sir.

Q. And the gate there? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And you keep that gate closed?

A. Well, at this time it was open. I had been working in the road. [140]

Q. And where was the truck situated when Erna got into it to go and get the mail?

(Testimony of Ernest Everett.)

A. It was sitting right out in front of the house.

Q. And from the gate to the crossing, did you estimate that distance for us yesterday as being a half a mile?

A. In that neighborhood, I would say.

Q. So what she did, then, was drive approximately a quarter of a mile from the house to the gate, is that correct? A. Yes.

Q. And then a half a mile from the gate to the crossing, is that true? A. Yes, sir.

Q. Did you suggest to her that she get in the truck and go and get that mail?

A. She came out of the house and went down there and asked if she could use the car to get the mail.

Q. And in order to get the mail, she had to cross over that crossing? A. Yes, sir.

Q. And where was this mail box situated, or was it a mail box?

A. Over by O'Neill's house.

Q. Over by O'Neill's house. This house that is shown on the map? [141] A. Yes, sir.

Q. So you granted her, then, the permission to use the truck to go and get the mail?

A. Yes, sir.

Q. And did you have some further conversation with her? A. No, sir.

Q. You knew that that passenger train was due by there any moment, didn't you?

A. Well, I was working at the time and I, like

(Testimony of Ernest Everett.)

anybody else, didn't never look to see what time it was. I was working around there, didn't pay any attention to the time.

Q. Well, my question is, didn't you know at that time that that passenger train had not gone by and it was due over that crossing any moment?

A. No, I never, working, I never give it a thought, really, what time it was.

Q. Did you admonish Erna or caution her——

A. Oh, yes.

Q. ——when she left the house to be careful, watch out for that train? You told her that, didn't you?

A. Yes, I told her to watch out for trains.

Q. Told her to watch out for that train?

A. Not any particular train. I never give it a thought what time it was. [142]

Q. Well, didn't you specifically refer to the passenger train, in substance to her say "Watch out for that passenger train"?

A. There could be trains coming either way, you know.

Q. Well, what I am getting at is this: Do you recall cautioning her to watch out for that passenger train, the one that struck her, it was due there most any time?

A. Well, if I had had that in my mind, I would probably have held her up, but it come so quick, you see, that I never realized what time it was.

Q. Well, you went down to the crossing, of

(Testimony of Ernest Everett.)

course, when you were apprised of this unfortunate tragedy, didn't you? A. Yes, sir.

Q. And there were quite a few people or several gathered around there, were there not?

A. Yes, sir.

Q. Three O'Neills were there. You know the O'Neills, don't you? A. Yes, sir.

Q. Know them very well?

A. Well, pretty well, especially the one that lives there.

Q. Well, there is Larry and John, and what is the one? Lee? [143]

Mr. Etter: Leo.

Q. (By Mr. McKevitt): Do you know them all?

A. Yes, sir.

Q. What O'Neills did you see there at the crossing when you got there?

A. Well, I didn't see any of them when I got there.

Q. Did you see any state highway patrolman there?

A. Yes, I think there was a state highway man.

Q. Do you know Sheriff Dorsey?

A. Yes, sir.

Q. He was there? A. Yes, sir.

Q. They were there in their official capacity, were they not, in making an investigation?

A. Yes, I suppose.

Q. You had a conversation with Mr. Scobee, the engineer?

Stand up Mr. Scobee, will you please?

(Testimony of Ernest Everett.)

(Mr. Scobee stood up in the back of the courtroom.)

You saw him down there that day, didn't you?

A. I don't recollect ever talking to him. I remember talking to the conductor.

Q. Well, you inquired of somebody as to who the engineer of the train was, didn't you? [144]

A. Well, I don't remember that.

Q. And you don't remember, then, whether or not you talked to Mr. Scobee? A. No, I don't.

Q. Well, to refresh your recollection, didn't you, in substance inform the engineer that you had cautioned Erna that day to watch out for this passenger train; that it was due along there any moment, in substance, something like that, didn't you? A. You mean up there?

Q. Didn't you have that conversation with Mr. Scobee, didn't you tell him that?

A. I don't remember talking to Mr. Scobee.

Q. I see. Then, you have no recollection one way or the other? A. No.

Q. Is that correct? A. Yes.

Q. How long were you at the crossing, Mr. Everett?

A. Well, we got there just a little bit before the ambulance come, and I waited until the ambulance come and they took her away, and then Mr. Klocke took me home.

Q. Well, were you there 10 or 15 minutes?

A. Well, I couldn't say exactly the time because I—things passed pretty fast and I was excited,

(Testimony of Ernest Everett.)

pretty [145] hard to tell just how long I was there.

Q. Did you notice either the state highway patrolman or the Sheriff making any observations along the track there?

A. They were just standing there, I guess. I can remember——

Q. You don't remember whether you saw them making any observations? A. No.

Q. East of the crossing?

A. Not while I was there, I don't think they were.

Q. I see. Now, this tract that you have down there is how large? 80 acres?

A. There is 80 acres, yes.

Q. And you were doing some kind of work near the house? A. Yes, sir.

Q. And what kind of work was that?

A. It was tearing an old bridge out across the creek.

Q. Now, when Erna got in the truck and started driving toward the gate, did you watch the progress of the car up to the gate?

A. Well, see, I went about 200 feet out by the barn, I had another gate and I walked out there.

Q. I didn't get that? You went up 200 feet up to the barn? [146]

A. Somewhere near there. At the time at the barn, I had another gate and I walked out there and opened it for her and she went on through, and then I stood there, because I had just been working that road out to the county road, which

(Testimony of Ernest Everett.)

was a little bit slick yet, and see if she got—went along all right. And after she got through the gate on the county road, why, then I thought I heard something coming and I walked out further where I could see down toward the railroad and I saw the train come in there, and she was just going outside of the timber around by Mr. Klocke's.

Q. Well, you watched her progress from the time she left the house until she got to the gate, didn't you? A. Yes, sir.

Q. Then did she make a right-hand turn?

A. Yes, sir.

Q. And went along the county road toward the crossing? A. Yes.

Q. And after she got onto the county road, you followed her progress, do I understand you, until she disappeared from your view? A. Yes.

Q. And where did she disappear from your view with reference to the Klocke house?

A. Yes, right across from the Klocke house, they had some [147] timber there and some trees, and she disappeared behind that, and then on up further there was brush and stuff and I couldn't see any further.

Q. The Klocke house is on the same side of the highway, the Klocke residence is on the same side of the county highway as yours, isn't it?

A. Yes.

Q. And it is the first house immediately, we'll call it on the map direction, it would be immedi-

(Testimony of Ernest Everett.)

ately north toward the crossing, it is the first house? A. Yes.

Q. And did you measure any distance from the Klocke house up to the crossing?

A. Well, on the speedometer on the car.

Q. And what do you estimate that distance to be from a point on the county road opposite the Klocke home to the railroad crossing?

A. Three-tenths of a mile.

Q. Three-tenths of a mile. You clocked that on your speedometer? A. Yes.

Q. When did you do that?

A. Well, it was a short time afterwards.

Q. In preparation for this lawsuit?

A. Well, I—— [148]

Q. Well, it was after the lawsuit was started?

A. No, it was before that.

Q. Have you done it recently? A. Yes.

Q. Within the last week or so? A. Yes.

Q. In company with Mr. Etter, your attorney?

A. Yes, sir.

Q. And it showed three-tenths of a mile?

A. Yes, sir.

Q. Now, after she disappeared from your view, was it at that time that you had first some notice of the approach of this passenger train, is that right?

A. I didn't get the question.

Q. Your daughter was along the county road at some point when you saw this passenger train?

A. Oh, yes.

(Testimony of Ernest Everett.)

Q. For the first time? A. Yes.

Q. And that she was at a point, do I understand it, just about opposite the Klocke house, a little further toward the crossing, when you saw the train? A. Yes.

Q. And where was the train when you first saw it?

A. Well, it was coming just in sight down there by a billboard along the highway. [149]

Q. All right, but so we can locate it definitely on the map, Mr. Everett, if you please, was it what we call east of the old Milwaukee overpass in this direction toward Ellensburg? A. Yes.

Q. Down where that Northern Pacific whistle post is shown in these photographs, do you know where that is located? A. Yes, yes.

Q. With reference to that whistle post, where was the train? Was it toward Ellensburg?

A. Toward Ellensburg.

Q. Toward Ellensburg? A. Oh, yes.

Q. And after you saw that train, did it enter your mind then as to whether or not your daughter was going to reach the crossing before the train and get over it safely, or whether the train would reach it before she did; isn't that correct?

A. I figured she had plenty of time to get across the crossing, just my estimate.

Q. You were concerned about whether or not she would get over the crossing, weren't you, ahead of the train, or stop short of it, you were concerned about that? [150] A. Well——

(Testimony of Ernest Everett.)

Q. Weren't you?

A. I figured she would have plenty of time.

Q. Well, my question is, weren't you concerned about that? A. Probably was.

Q. Yes. How fast was she driving that truck when she disappeared from your view?

A. Well, just an estimate, I would say 25, 30 miles an hour.

Q. 25 to 30 miles an hour. And that is level county road in a straight direction until it gets about a couple of hundred feet or so from the crossing, isn't it? A. Yes.

Q. What would you estimate the distance that train was from the crossing when you first saw it?

A. I think it was about a mile and three-tenths.

Q. And you used that figure yesterday in your interrogation by Mr. Etter, a mile and three-tenths. You paced that off, didn't you? A. Yes.

Q. You and Mr. Etter with Mr. Connelly there?

A. Yes, sir.

Q. And you asked Mr. Klocke to go along, isn't that correct? [151] A. Yes, sir.

Q. And Mr. Etter, I believe he used the phrase of "checking and rechecking" that distance. Do you recall that? A. Yes, sir.

Q. In other words, you wanted to make certain that that measurement of a mile and three-tenths was correct? A. Yes, sir.

Q. And for the purpose of establishing where that train was when you first saw it. What the

(Testimony of Ernest Everett.)

speed of that truck was being driven by Erna, after she passed out of view, you don't know, do you?

A. No.

Q. Whether she increased it or slowed it down, you don't know that? A. No, sir.

Q. No. And you haven't been able to locate any witness that knew what her speed was after she got by the Klocke house? A. No, sir.

Q. And you have tried to find out if there were some witnesses that did know, isn't that correct? You have made investigations, naturally, haven't you?

A. Well, I don't—be pretty hard to tell how fast she was going even if they saw her going, wouldn't it?

Q. Well, you had information prior to the opening of this [152] trial that the O'Neills knew something about this accident, didn't you?

A. Yes.

Q. Is that correct? A. Yes.

Q. And you talked with them, didn't you?

A. Yes, sir.

Q. Yes. And you asked them what they saw and heard, didn't you? A. Yes, sir.

Q. And not one of them told you that they saw that truck driven by your daughter, not one of the three told you that they saw it approaching the crossing; isn't that correct? A. Yes, sir.

Q. And not one of them told you how long it was stalled on the crossing, isn't that correct?

A. That's right.

(Testimony of Ernest Everett.)

Q. And so far as you know, there is no one down in that neighborhood who knows how long that truck was stalled on that crossing; that is correct, isn't it? A. Yes, sir.

Q. What was the mechanical condition of the truck, generally, on that date?

A. Well, it had been a little hard to start. [153]

Q. What?

A. It was a little hard to start in the mornings, and prior to that one day I adjusted the carburetor a little bit, dirt or something got in there, and the Friday before I had taken it to town and it had run perfect.

Q. Mr. Klocke, as you say, you and he are close neighbors, aren't you? A. Yes, sir.

Q. As a matter of fact, his daughter would on occasions visit your daughter and on occasions she would visit at the Klocke home? A. Yes, sir.

Q. Mr. Klocke was up to the crossing that day, wasn't he? A. Yes, sir.

Q. Did you have any conversation with Mr. Klocke on that date about the condition of this truck that you recall, the mechanical condition of any portion of the mechanics of it?

A. I might have, I just can't recollect. We were talking about this and that and everything at the time, you know, excited.

Q. What is meant by the idling jet on that truck?

A. Well, that is to regulate your gasoline in the carburetor.

(Testimony of Ernest Everett.)

Q. It has reference to the carburetor? [154]

A. Yes.

Q. Well, you had a discussion with Mr. Klocke trying to figure out the reasons for that truck stalling on that crossing, didn't you? There was some discussion about that?

A. I might have had.

Q. I will ask you if at that time and on that date shortly after the accident and up near the crossing, in substance, you didn't inform Mr. Leo or Lee Klocke in substance this: The idling jet was plugged and at a slow speed the truck would stall? In substance, didn't you make a statement of that character to Mr. Lee Klocke?

A. Well, I never had it——

Q. He is in the courtroom, isn't he?

A. I never had it stall with me. Just in the mornings, it was cold, it would be hard to start. He must have misunderstood me on that phrase, because——

Q. Well, do I understand, then, that your answer is that you didn't make a statement of that character or similar thereto to Mr. Klocke? Is that your testimony?

A. Well, I might have said that I had had a little carburetor trouble, see, and prior to this, which I did, especially in starting the Dodge cars in the cold weather, they were hard to start. [155]

Q. Well, Mr. Everett, what I want to be sure of is as to whether or not, in substance, you did state to Mr. Klocke up there at the crossing that the

(Testimony of Ernest Everett.)

idling jet was plugged and that at slow speed the truck would stall?

A. Well, I may have said that, but it never stalled with me.

Q. Well, was the idling jet plugged on that date?

A. It was just—I figured it was just getting—you mean that day?

Q. Yes?

A. No, she got in the car and took right off. She didn't have a bit of trouble.

Q. Well, but it had—at slow speed on that date, would the truck stall?

A. Well, she drove out to the gate and slowed down and stopped. I opened the gate, went right ahead, never had a bit of trouble going out through that gate, and she had to come to practically a stop when I opened the gate.

Q. Well, put it this way: You are familiar with the general approach to that crossing from a point 200 feet back on that county road? You are familiar with the approach generally from about 200 feet into the crossing, aren't you? [156] A. Yes.

Q. Driven over it many, many times?

A. Yes.

Q. And you are familiar generally with the grade as you approach the crossing?

A. Yes, sir.

Q. And having in mind the nature of that grade there, what is the fact as to whether or not at a slow speed the truck might stall?

(Testimony of Ernest Everett.)

A. Well, it could, in making this raise and making that turn.

Q. Yes. Did I understand you correctly yesterday—if I am mistaken, tell me so—that in operating that truck over there generally, in reference to your description of the grade, that you customarily shift gears? A. Yes.

Q. What gear would you go into?

A. I generally run it in second.

Q. Low gear? A. Second.

Q. Second gear. Was that because of the grade or because of the condition of the truck or a combination of both?

A. Because of the grade and the jump-up there.

Q. Now, in addition to what you may or may not have said [157] to Mr. Klocke about this carburetor or an idling jet, didn't you advise him on that date that Erna was not very familiar with that truck, that she had not driven it that spring; didn't you so advise him?

A. She—that is the first time that spring she had driven it, because the snow had been on, just got the roads worked down and smoothed up and the snow was gone.

Q. Well, on how many occasions did she drive this truck over that crossing prior to this unfortunate day?

A. Well, I couldn't just remember all the times she had went the fall before, but she had went up there a good many times to get the mail in it.

Q. She had driven that same truck over that

(Testimony of Ernest Everett.)

same crossing a good many times to get the mail before the date of the accident, prior to the date of the accident?

A. The fall, that year before. It got bad weather, she never drove it after the snow came.

Q. You say she wouldn't operate the truck over the crossing during the winter weather?

A. No, I never let her take it when it was bad weather.

Q. Did she operate that truck over that crossing in the month of March of 1951?

A. No, I don't think so.

Q. You don't think so. You moved there in November of 1950, is that correct? [158]

A. Yes.

Q. Between November of 1950 and March of 1951, some five months, in that period of time did she ever operate that truck over that crossing toward the highway?

A. Between '51 and '52, the summer?

Q. Yes, November of 1950, which is when you moved down there, isn't it?

A. Yes, yes.

Q. Between November of 1950 and March of 1951, some five months later, in that five months interval, did she operate that truck over that crossing?

A. No, I don't believe she did, because we had some bad weather just as soon as we moved out there.

Q. Well, I don't know whether you have told us or not approximately how many times she had

(Testimony of Ernest Everett.)

driven that same truck over that crossing in that direction?

A. Well, that would be hard for me to estimate. I never kept track of the times that she had went up there.

Q. Well——

A. She used to go up there and get the mail.

Q. Was it 10 times, would you say, at least?

A. Well, I would say at least that much.

Q. Was it 20?

A. Well, I couldn't say whether it was 20 times or not. [159]

Q. Why did she select this particular time of day to go and get that mail?

Mr. Etter: If you know.

Mr. McKevitt: If you know.

A. Well, it was Saturday afternoon and she was home and I was working, you know how kids like to go get the mail.

Q. Well, what I had in mind was, about what time the mail delivery would be made to this box?

A. Well, I don't just know just what time the mail comes in. It is after one o'clock that the mail comes in, but I——

Q. The mail comes out of Ellensburg, does it?

A. Yes.

Q. And how is it gotten out there?

A. By rural mail.

Q. By rural? A. Yes.

Q. And that is on a regular schedule, isn't it?

A. Yes.

(Testimony of Ernest Everett.)

Q. Every day? A. Yes.

Q. And that schedule, mail delivered is delivered at the mail box at what time in the afternoon?

A. Well, I don't know exactly because I never happened [160] to be right there when the mailman come. I have been there at one o'clock times and it hasn't come in.

Q. More than one delivery of rural mail a day at that time? A. Yes, sir, once a day.

Q. Once a day? A. Yes, sir.

Q. And that was a regular custom?

A. Yes.

Q. And on previous occasions when she would go to get the mail, would she leave about that time in the afternoon?

A. Well, just like she didn't happen to be doing anything or something and think about going and getting it, I suppose then she would go. If she happened to be doing something, why, at one certain time, she wouldn't be probably going at that time.

Q. I suppose, naturally, that not only she, but you and your wife, were interested to know whether or not each day there would be some mail coming to that box for delivery to your home or to be picked up by you people? A. Yes.

Q. Isn't that right? A. Yes, sir.

Q. And I suppose you made it a custom once a day or once every other day or two or three days, to go down and pick up your mail? [161]

(Testimony of Ernest Everett.)

A. When I was working, I always picked it up when I come home from work.

Q. Well, then, it was your custom to go into the mail box, either you or your daughter, or your wife?
A. Yes, oh, yes.

Q. How frequently a week, put it that way?

A. Go from home? Well, we always when I didn't work on a Saturday, we generally, somebody went up on Saturday.

Q. Well, would you let a week go by before you would look to see if you have any mail?

A. Well, when I was working during the week, I picked it up when I came home nights.

Q. Whether you picked it up on your way home or whether you went from your home to get it, did you average more than two or three times a week?

A. I picked it up every day.

Q. Every day, that is what I am getting at?

A. Oh, yes.

Q. And where were you working when you were not engaged on the farm? When you were doing other work, where were you employed?

A. In Ellensburg.

Q. In Ellensburg. And were you employed doing work in Ellensburg prior to this accident in March of 1952?
A. Yes, sir. [162]

Q. How would you go from Ellensburg—from your home to Ellensburg? In that truck?

A. Yes, sir.

Q. Was that the only automobile you had on the ranch?
A. Yes, sir.

(Testimony of Ernest Everett.)

Q. Did you ever authorize or permit knowingly Erna to drive that truck into Ellensburg?

A. No, sir. She never did.

Q. You only permitted her to use it when she would go get the mail?

A. Yes, on the county road there.

Q. Pardon me?

A. Just to go to the mail.

Q. Now, getting back to the train, Mr. Everett, when you saw it at that point a mile and three-tenths from the crossing, for what distance, if you are able to tell us, did it remain in your view?

A. Well, I think just about up to the whistle post, I could still see it, I think.

Q. From where you were standing on that date, it is your best recollection that after it got by the whistle post, some 1,320 feet east of the crossing, it passed out of your view?

A. Yes, there was brush along there, you see, that I [163] couldn't see. In that neighborhood, I couldn't say exactly just——

Q. And, at least, you couldn't see it immediately before it passed under the Milwaukee overhead or after it got under it you couldn't see it then?

A. No, no.

Q. You say that sometime there you heard, as I believe you described it, two or three toots. You are referring now to the whistle, aren't you?

A. Well, I thought I heard two or three toots.

Q. Well, you used that expression, don't you recall yesterday, two or three toots? A. Yes.

(Testimony of Ernest Everett.)

Q. You heard those two or three toots how long after you first saw this train a mile and three-tenths away?

A. Well, after it went out of sight. I don't know just where it was at.

Q. Well, it went out of your sight when it got by the whistle post, is that right?

A. Somewhere along there.

Q. And after it got by the whistle post is when you heard these two or three toots, isn't that right?

A. Yes, sir.

Q. And where the train was at that time, you don't know? A. No. [164]

Q. But the two or three toots that you heard were the whistle on that locomotive, wasn't it?

A. Yes.

Q. You could hear it very distinctly where you were, couldn't you? A. Yes, sir.

Q. How long was it after you heard these two or three toots that, in some manner or other, you got information that something might have happened or did happen up at that crossing? How long was it after you heard the engine whistle?

A. Well, I couldn't say. I waited there quite awhile until I figured she had time enough to be on her way back and I didn't see nothing of her, and so then I decided something might have happened and I started up the road.

Q. In other words, no one told you that anything had happened at that crossing, did they?

A. No, sir.

(Testimony of Ernest Everett.)

Q. You had no conveyance of your own to take you to the crossing? A. No, sir.

Q. So then a very short time after Erna left, you decided to go up to the crossing, didn't you?

A. I figured that she—waited until she had time to show [165] up in sight, then I figured she had time enough to be back.

Q. Well, my question is, within a very short time after the truck disappeared from your view, you decided to go up to that crossing, didn't you?

Mr. Etter: I will object to that question. He has already answered in the best way he can that he gave her time enough to get back, and counsel is still insisting, by a leading and suggestive question, a very short time. That is counsel's statement and not the answer of the witness.

Mr. McKevitt: Oh, I am cross-examining.

The Court: Proceed. I think he may answer.

Mr. McKevitt: All right.

Q. Within a very short time after Erna disappeared from your view near the Klocke home, you decided to go up to that crossing, didn't you?

Mr. Etter: The question is repetitious. I will object on that ground, too. That is the third time——

The Court: Well, I am not sure he has answered directly. You may answer.

A. Well, I couldn't say exactly how long it was before I started up there. I figured she had time enough to come back in view before I left.

Q. (By Mr. McKevitt): Well, what caused you to start up toward that crossing? What happened?

(Testimony of Ernest Everett.)

A. Well, things could happen, you know, in your mind, when anything like that——

Q. No one phoned you? A. No.

Q. That anything had happened? No one told you that anything had happened?

A. But I saw the train and, you know, you just in my mind that something could have happened.

Q. And you started on foot and you went out through the gate, did you not? A. Yes, sir.

Q. I suppose you were running, weren't you?

A. No, I was walking.

Q. And how far did you walk?

A. Well, I got up just about to Klocke's gate when somebody came along in a car.

Q. And who was that?

A. I think his name was Whitson, or some such name, picked me up and took me back up there.

Q. Whitson?

A. Whitson, I think that was it.

Q. Did you know him before this accident?

A. No, I didn't.

Q. He drove you up to the crossing? [167]

A. Yes.

Q. Before you got to the crossing and before you could see the crossing, were you advised by anyone that this passenger train had struck the truck? Before you got there, did you know that?

A. Well, they told me something had happened, you see.

Q. Who told you that?

A. This man in the car, Whitson.

(Testimony of Ernest Everett.)

Q. Where did he come from? Some place towards the county road away from the crossing, didn't he?

A. I don't know whether he came down the highway or where, but he came along about that time and I guess he must have stopped there.

Q. Well, was he driving up there to go to the crossing to find out, did he tell you that, what had happened, if anything?

A. Well, he just told me that something had happened, that somebody had told him, must have told him, where I lived, and he volunteered to come down to get me, is the only way I could——

Q. Pardon me, have you finished?

A. That is the only way I could see.

Q. From what conversation you had with Mr. Whitson, you got the information that this train had hit a truck, some truck, up there; isn't that correct? [168]

A. Yes, sir.

Mr. McKevitt: May I confer with Mr. Thomas a brief moment?

The Court: Yes.

Q. (By Mr. McKevitt): Mr. Klocke, it is a fact, is it not——

Mr. Etters: Mr. Everett.

Mr. McKevitt: Or Mr. Everett, thank you, Mr. Etter.

Q. Mr. Everett, it is a fact, is it not, that on the day that Erna met her unfortunate death and prior to that time, she did not have a license to operate a motor vehicle?

(Testimony of Ernest Everett.)

Mr. Etter: I will object to that question, of course, because there is no causal relationship shown. Whether she did or whether she didn't have, it is a question of contributory negligence on the facts and circumstances of the evidence.

Mr. McKevitt: We have authority on it, if your Honor wishes to hear it.

Mr. Etter: I would like to hear it.

The Court: Well, it is about time for the morning recess, I will excuse the jury for the morning recess.

(Whereupon, the following proceedings were had out of the presence of the jury.) [169]

The Court: I am not sure who has the affirmative of the issue here. Do you wish to proceed, Mr. McKevitt?

Mr. McKevitt: Preliminary to the brief statement I will make on the law question touching this point, your Honor will recall that I have alleged affirmatively not only the negligence of the girl, but the negligence of the father.

The Court: Yes, I notice you have alleged both negligence of the deceased and negligence of the plaintiff.

Mr. McKevitt: And since no motion was directed toward the affirmative defense, this evidence is admissible, if it is proper at all. That is my viewpoint.

The Court: I see.

Mr. McKevitt: The case that I direct your Honor's attention to as authority for this proposi-

(Testimony of Ernest Everett.)

tion is the case of *Atkins vs. Churchill*, 30 Washington (2d), Page 859, the case having been decided June 1, 1948, and Syllabus 14 is as follows:

"The act of the owner of an automobile in entrusting it to two minors under the age designated by the statute constituted negligence per se."

Now, in the body of the opinion and touching that [170] question, beginning at Page 865, the Court says:

"In addition, there was affirmative evidence to warrant submission to the jury of the question of negligence of appellant in entrusting his automobile to an unlicensed minor."

And then it cites a case from 183 Washington, 162, and an annotation of 68 A.L.R. In that annotation is collected the cases which support the general rule that:

"The owner of a vehicle who entrusts the vehicle in the hands of an unfit person, thereby enabling the latter to drive it, may be held liable for an injury negligently inflicted by the use made of the vehicle by its driver as a proximate result of the incompetency or unfitness of the driver, although the use being made of the vehicle at the time of injury was beyond the scope of the owner's consent."

And more particularly now this language:

"The authorities uniformly hold that it is negligence per se for the owner of a motor vehicle to entrust it to a minor under the age specified by statute. The prohibitory enactment itself constitutes

(Testimony of Ernest Everett.)

a conclusive [171] declaration that an individual younger than the age designated is incompetent to drive a motor vehicle."

The Court: What is the minimum age at which a minor can get an automobile driver's license in the State of Washington?

Mr. Etter: 16.

The Court: It is 16?

Mr. Etter: Yes.

The Court: Except for some purposes they can get it for driving to school at 15.

Mr. Etter: Yes, they can get a permit.

Mr. Connelly: They can get a permit and farm people can get a permit to drive when younger for exclusive use on, I believe, secondary county roads and around the farm.

Mr. McKevitt: But this young girl on this occasion, I don't think counsel take the position that she falls within any special provision of the statute. In the Revised Code, it is 4620.

The Court: R.C.W.

Mr. McKevitt: It is that new gadget that I don't use very often because I don't know much about how to find things in it. 46.20-20, Operator's License, and so on. The heading is, "Unlawfully Permitting Child to Operate:"

"It shall be unlawful for a person to cause [172] or knowingly permit his child or ward under the age of 18 years to operate a motor vehicle upon a public highway as a vehicle operator, unless such

(Testimony of Ernest Everett.)

child or ward has first attained a vehicle operator's license."

Mr. Etter: My daughter is 16 and she has got a valid operator's license.

The Court: Beg pardon?

Mr. Etter: My daughter, I say, is 16 and she has a valid operator's license issued by the State Patrol.

The Court: It seems to me there are two things here involved. One would be a situation where the child is of the age where she couldn't get a license——

Mr. Etter: Right.

The Court: The other is where the minor is of the age where it would be possible to get a license, but she doesn't have one.

Mr. McKevitt: And that is where she falls within the prohibition of this statute.

Mr. Etter: Oh, no.

The Court: If she simply failed to get the license, then I think in order to avail yourself of the negligence of the father, you would have to show she was incompetent to drive. [173]

Mr. McKevitt: No.

The Court: There hasn't been any evidence so far she is incapable of driving.

Mr. McKevitt: No, I think, your Honor, if I may——

The Court: Well, I will take a look at that case during the recess. Court will recess for——

Mr. McKevitt: The particular language that I have in that regard, in answer to your Honor's

(Testimony of Ernest Everett.)

question, that I don't care how careful an operator she is, under the language of this decision, you have got to indulge a presumption that she is incompetent.

The Court: If she is too young to get a license, the presumption is she is not capable of driving. That is the presumption.

Mr. McKevitt: That isn't the way I understand it. Maybe your Honor interprets it correctly.

The Court: I misunderstand it, then, I guess.

Mr. McKevitt: The authorities uniformly hold that it is negligence per se for the owner of a motor vehicle to entrust it to a minor under the age specified by statute.

"The prohibitory enactment itself constitutes a conclusive declaration that an individual younger than the age designated is incompetent to drive a motor vehicle." [174]

If I understand that correctly, no matter how skillful she is, if she hasn't got a license, it is the presumption that she is not competent to drive.

Mr. Etter: Well, what if she is an excellent and very skilled driver and she is over the age provided by the license provision, but hasn't got a license? Now, that is what counsel is saying.

The Court: It seems to me that the only difference here in this statute between an adult and a minor is that the adult is responsible for his own conduct so it is unlawful for an adult to drive without getting a license. In the case of a minor, they put the responsibility on the parent and say

(Testimony of Ernest Everett.)

no parent shall permit the minor to drive unless they are 18 years of age, but it seems to me that this rule applies to, say, somebody 14 years of age. If a minor 14 years of age drove, then the presumption would be that they were not capable of driving.

Of course, if your position is correct here, we have not further need of a jury, because——

Mr. Etter: That's right.

The Court: Because the Court should direct a verdict if it is negligence per se. There is nothing for the jury to decide.

Mr. McKevitt: I know it is a very vital legal question, your Honor. [175]

The Court: I will take a look at that case during the recess. Court will recess for ten minutes.

(Whereupon, a short recess was taken.)

The Court: I have taken rather a hurried look at this case of Atkins vs. Churchill that Mr. McKevitt cited and appears in 30 Washington (2d), 859. The fact statement is rather long and involved and a little difficult to follow, but here there was the issue presented to the jury that the appellant, who was the defendant below, had entrusted his automobile to two immature minors, his daughter Hattie and Jerry Rubenstein, although they were not either of them the driver of the car at the time of the collision. At the bottom of Page 865, it appears that:

“It is admitted that appellant entrusted his automobile to his immature daughter and to Jerry Rubenstein, both of whom were under the age desig-

(Testimony of Ernest Everett.)

nated by law as eligible to operate a motor vehicle.”

Now, referring back to the top of Page 864, we find what that age was:

“His daughter Hattie, a student of Centralia High School, invited Wayne Tamblyn as a guest.”

This was a mixed-up affair where the young people were running all around to various functions.

“Two other high school girls, Donna Madsen and Rachel Thompson, friends of Miss Churchill, invited Roger Zorn and Jerry Rubenstein as their guests. None of these six persons,”

That is, the daughter Hattie and even Rubenstein, as mentioned down here, the ones he entrusted his automobile to,

“None of these six persons was more than 15 years of age, and none had an automobile operator’s license or was qualified, under the statute, which provides that a vehicle operator’s license shall not issue to any person under the age of 16 years.”

Then it cites Remington Supplement 1947, Section 6312-45.

Now, the part that Mr. McKevitt read, the general rule is stated that:

“The owner of a motor vehicle who entrusts the vehicle in the hands of an unfit person, thereby enabling the latter to drive it, may be held liable for an injury negligently inflicted by the use of the vehicle by its driver as a proximate result of incompetency or unfitness of the driver, although the use [177] being made of the vehicle at the time of

(Testimony of Ernest Everett.)

injury was beyond the scope of the owner's consent. The authorities uniformly hold that it is negligence per se for the owner of a motor vehicle to entrust it to a minor under the age specified by statute."

Now, I take that to be under the age specified by statute, under the age of 16, and not under the age of 18 years. The 18 years simply provides that no parent shall permit a minor under 18 to drive a car unless they have a license. I think that is apparent from the next sentence:

"The prohibitory enactment itself constitutes a conclusive declaration that the individual younger than the age designated is incompetent to drive a motor vehicle."

Now, how could the law conclusively declare a person under 18 is incompetent to drive a motor vehicle if their parent chooses to turn around and give them a license to drive one? There is no conclusive declaration that a person 17 years of age, certainly, is incapable of driving a motor vehicle. If that were the policy of the law, there wouldn't be any license issued to them. So that I think this applies only to those cases where the minor is of the age where they are not eligible under any circumstances [178] to procure a driver's license, and I think under the rule relied upon here, that it is immaterial whether or not this girl had a license. The only way that defense could be established, I think, is to show she was incompetent to drive an automobile, and there hasn't been evidence of that so far, certainly.

(Testimony of Ernest Everett.)

The record may show an exception to my ruling, if you think it would be helpful to have one, Mr. McKevitt.

Mr. McKevitt: With your Honor's permission, in the absence of the jury, I would like to make a short offer of proof on that.

The Court: Yes, all right.

Mr. McKevitt: The defendant Northern Pacific Railway now offers to prove by cross-examination of the plaintiff in this action that at the time of the death of Erna Mae, she did not have, possess, or own, nor was there issued to her, a license by the State of Washington to operate a motor vehicle upon the highways of this state.

Mr. Etter: I think it should further be shown that at the time of offer of proof is made, that the girl was 16 years and 11 months old.

Mr. McKevitt: Well, that is in the record already.

The Court: Yes, that will be in the record. I suppose an objection is made?

Mr. Etter: Yes, your Honor. [179]

The Court: It will be sustained.

All right, you may bring in the jury.

Mr. Etter: Your Honor will advise the jury on the ruling?

The Court: Yes.

(Whereupon, the following proceedings were had in the presence of the jury.)

The Court: All right, gentlemen of the jury, I explained to you at the outset that the Court has

(Testimony of Ernest Everett.)

sole responsibility for deciding these questions of law, and the Court has decided, as a matter of law, that the objection should be sustained to the last question as to whether the deceased girl had a motor vehicle operator's license. You should disregard the question and not speculate as to what the answer might have been.

Proceed. Mr. Everett, you are still on the stand, you are under cross-examination.

Mr. McKevitt: No further cross-examination.

The Court: All right, redirect?

Mr. Etter: Just a question or two.

Redirect Examination

Q. (By Mr. Etter): Mr. Everett, had you any time prior to the accident had [180] any difficulty with the carburetion?

A. Well, in starting the car at times in the morning, it was cold, you see, and I had a little trouble in starting and I had adjusted the carburetor.

Q. You say you had adjusted the carburetor?

A. Yes, and prior to this and several days before, and I drove to town on a Friday before the accident and got groceries and stuff.

Q. You say that some days before this happened, you had made an adjustment, is that right?

A. Yes.

Q. And then that you drove to Ellensburg on the Friday before the accident happened?

A. On Friday, yes.

(Testimony of Ernest Everett.)

Q. Did you discuss this with Mr. Klocke, do you recall, about your carburetion trouble?

A. Oh, yes.

Q. You had discussed it with him?

A. I had told him that I had trouble, you know, in starting the car in the mornings when it was cold and I had adjusted the carburetor in the meantime.

Q. I see. Did you say that it had been plugging or something to that effect? I gather that that was what counsel was asking. Did you tell him anything like that that you recall? [181]

A. Well, the carburetor trouble, I don't just remember the words I said.

Q. All right.

Mr. Etter: I think that is all.

Recross Examination

Q. (By Mr. McKevitt): When did you have, and where, this conversation with Mr. Klocke about carburetor difficulties in starting when it was cold? Where did you have that conversation and when? Was it up at the crossing?

A. Well, I couldn't just remember when it was.

Q. Well, was it——

A. That we were talking about the car, whether it was afterwards. It might have been afterwards, I couldn't recollect just when it was.

Q. Well, was it after the accident?

A. It may have been, I think it was.

Q. How long, Mr. Everett?

(Testimony of Ernest Everett.)

A. Well, I couldn't say.

Q. And where did the conversation take place?

A. Well, I couldn't say that, either, now, whether it was at his place or up there or he brought me home. It might have been on the road home.

Q. From the crossing? [182]

A. I couldn't say exactly when it was.

Q. Well, was it that same day?

A. Well, I couldn't say that, either, for sure.

Q. Well, do you have any recollection when you had this conversation with him, having in mind the date of the accident?

A. Well, I have been up there and he had been down there several times after the accident and we talked about it.

Q. Well, is it your testimony that you don't know whether that conversation took place on the day of the accident or not?

A. I don't recollect right now just when it did take place.

Q. Have no idea in that regard, haven't you any recollection at all?

A. We were talking and everything, we was upset so bad, you know, that I don't remember just when it was that it happened.

Mr. McKevitt: That is all.

Mr. Etter: That is all.

(Witness excused.)

Mr. McKevitt: Your Honor, may I confer with

Mr. Etter with reference to one witness that we both subpoenaed?

The Court: Yes. [183]

(Off-the-record discussion between counsel out of the hearing of the reporter.)

Mr. Etter: Call Mr. Klocke, your Honor.

The Court: All right.

LEE KLOCKE,

called and sworn as a witness on behalf of the plaintiff, was examined and testified as follows:

Direct Examination

Q. (By Mr. Etter): Will you state your name, please? A. Lee Klocke.

Q. Lee Klocke. And where do you reside, Mr. Klocke? A. Ellensburg, Washington.

Q. And will you tell us, you are there with your family, are you, sir? A. Yes, sir.

Q. And what people comprise your family?

A. I have two daughters.

Q. You have two daughters. And you say that you live near Ellensburg? A. Yes.

Q. Where do you live in relation to the residence of Mr. and Mrs. Everett?

A. Well, I live about 80 rods north of the Everett home. [184]

Q. Of the Everett home? A. Uh-huh.

Q. Is that on the same highway or the same county road to which a considerable reference has

(Testimony of Lee Klocke.)

been made as going past your house and extending up in the direction of the Everett home?

A. It is.

Q. It is. And did you say how long you have lived there, Mr. Klocke?

A. It was 20 years this spring.

Q. At the same residence?

A. That's right.

Q. And you are acquainted, are you, with Mr. and Mrs. Everett? A. I am.

Q. And have been neighbors with them since they moved there from Kalispell, Montana, in 1952?

A. That's right.

Q. Mr. Klocke, have you had an opportunity since you have been in the courtroom to look at the diagram or the chart which has been prepared and designated here as Defendant's Exhibit No. 1?

A. I have looked at it.

Q. You have looked at it. Does that fairly represent the general area surrounding the place where the accident [185] occurred with respect to the county highway, the Milwaukee overpass, the Northern Pacific main line, and public highway and other points of designation, such as the O'Neill place, that are included within the diagram?

A. Well, looking at it, from my standpoint it is a little out of proportion. It doesn't look quite like I have it pictured in my mind, although it may be right.

Q. All right, in what respects do you feel that it is possibly out of proportion, Mr. Klocke?

(Testimony of Lee Klocke.)

A. Well, the road going south——

Q. Beg your pardon?

A. The road going south toward our home is straight south on the section line.

Q. You are referring to this (indicating on Exhibit 1)? A. That road there.

Q. It is straight south on the section line?

A. Straight south on the section line.

Q. All right.

A. And the road going east is also on the section line and it is straight east, so that would be pretty much——

Q. Which part of that road do you refer to now, the one going east on the section line?

A. The one that goes past the O'Neill house.

Q. This section here (indicating)? [186]

A. That is on the section line.

Q. That is on the section line?

A. That's right.

The Court: Pardon me, this might be helpful and might not be, but isn't that road going south represented on that map as being due south. Your direction indicator up there is that little mark. The railroad isn't strictly east and west. That is north and south, isn't it?

Mr. McKevitt: That's right.

The Court: So your road down there is substantially represented as going south, is that correct?

Mr. McKevitt: This road, your Honor (indicating)?

The Court: Yes, that one?

(Testimony of Lee Klocke.)

Mr. McKevitt: Yes, that is south.

The Court: I thought I would just call that point out, that it might be helpful.

Mr. McKevitt: Compass direction, that is south.

Mr. Etter: The directional marker appears that, yes.

Q. See that yellow pencil, I mean for directional purposes, we have marked these north, south, east and west, to comply with railroad parlance ordinarily, Mr. Klocke.

The Court: I think what might be confusing, ordinarily, the conventional map, up is north and down is south, [187] as we all remember, that isn't quite on that oriented that way.

Q. (By Mr. Etter): This is your general direction as indicated by the directional marker and, likewise, it is after the curve on the road (indicating). So that taking that as a directional marker and this as being substantially south, does that comply? A. That is about right.

Q. If we were to move these around, rather north here and south and east and west in that direction, turn it a little bit, is that right?

A. I see it all right now.

Q. All right, any other respect—

The Court: Pardon me, I don't want to inject too much into this. Is your testimony, Mr. Klocke, that after the road turns, it would be running not parallel to the railroad track, but rather up toward it in a strictly easterly direction after the road turns there and goes east? A. It runs—

(Testimony of Lee Klocke.)

The Court: It runs true east on the section line?

A. It runs—that is, for the first quarter of a mile it does.

The Court: I see.

A. And then it does make a jog. [188]

The Court: Then it would turn toward the railroad track and not be parallel with it there, if that is your testimony, is that correct? I don't want to confuse the witness, but I just want to find out what he is testifying.

A. You mean the road going east?

Mr. Etter: Would you come up to the map and tell us, if you will?

The Court: You get my point, do you not, Mr. McKevitt? I am just trying to find out what he is testifying.

Mr. McKevitt: Yes.

Mr. Etter: Yes.

Q. Extending this county road, I think the Court was inquiring whether or not after it turned here (indicating), did it parallel the railroad line? Does it parallel it?

A. This road here runs east and your railroad runs at the angle it is running, which would be southwest—southeast, rather, towards Ellensburg, and this runs more away from the railroad, but this road here would be—there is a slight curve in this road as we cross the N.P. here (indicating). But down here it would be perfectly square with

(Testimony of Lee Klocke.)

this, that they are both on the section line and the sections are square.

Q. I see. [189]

A. In other words, it would be a square corner.

Q. Wouldn't that, running along the section line after it made the turn, then, would it run on the direction as appears here, almost parallel with the railroad line?

Mr. McKevitt: What do you mean, that road?

A. Running straight. This runs straight south; the railroad runs southeast.

Q. (By Mr. Etter): Southeast, I see. So the railroad would be running southeast and this road would not? A. Straight south.

Q. Straight south.

A. It also moves. This is a trestle from here to here (indicating), and this road goes underneath the same trestle that the N.P. does.

Q. Under the same trestle?

A. Under the same trestle, which from this point to this point looks out of proportion to me, but maybe it isn't. In other words, the picture to my mind would be more this way (indicating).

Mr. McKevitt: Well, of course, Mr. Etter, I want to be clear on this for the record. No matter what the witness' independent view may be, I thought we were agreed when we furnished you that map, that that was an accurate map and made under actual survey. I don't know what the purpose is in going into it. Couldn't be anything except to [190] attack the accuracy of this map.

(Testimony of Lee Klocke.)

Mr. Etter: Well, now, Mr. McKevitt, I am not doing that at all, I certainly admit that your map is accurate on its face and under the degree, but I likewise don't think, do you, that the map is perfect as a visual guide or a visual aid to a jury? That is all I am trying to do is to give the jury a perfect picture, aside from a cold chart. I am not objecting to your chart at all.

Mr. McKevitt: Well, then——

The Court: Of course, you have this situation, too, do you not, that a part of the road there leading to the plaintiff's residence is not shown on the map?

Mr. Etter: Not shown at all.

Mr. McKevitt: It is below the map.

The Court: Yes, below the map.

Do you wish Mr. Klocke to stay down there?

Mr. Etter: No.

The Court: You may proceed with the examination.

Mr. Etter: You can step back up there, Mr. Klocke.

Q. Now, do you recall March the 8th what occurred particularly on that day as a result of this accident that occurred, Mr. Klocke?

A. Well, pretty well.

Q. All right, do you recall the train, that is, the Northern Pacific passenger train, on that date as it came out of Ellensburg? [191]

A. I saw the train.

Q. You saw the train?

(Testimony of Lee Klocke.)

A. I did see the train.

Q. Where were you at that time that you saw the train?

A. I happened to be welding in front of my shop.

Q. In the front of your shop?

A. I was welding on some material there and I just happened to raise the hood and did see the train go by.

Q. Do you recall where it was that you saw the train?

A. Well, it was—it would be straight east from where I was.

Q. Straight east from where you were?

A. That's right.

Q. And in that respect, assuming it to be straight east from where you were, are you able to give me any idea, directionally speaking, as to where the whistle post which is shown here, Mr. Klocke, this whistle post is shown up here (indicating), could you tell us where that would be, directionally speaking, from your house, which is down in here some place, I assume?

A. It would be straight east and about, maybe, 200 or 100 feet north.

Q. And 100 feet north? A. Yes. [192]

Q. Of your place? A. That's right.

Q. Okay. And can you tell us whether it was there or where was it with reference to the whistle post that you observed the train on that day?

A. Well, I just noticed the train go by.

(Testimony of Lee Klocke.)

Q. You noticed it go by? A. Go by.

Q. Did you see the train go under the overpass?

A. No, I can't see that from my place.

Q. You cannot see it from your place?

A. After it gets to the whistle post, I cannot see it.

Q. After it gets to the whistle post?

A. That's right.

Q. I see. I assume that when it passed the whistle post, that was as much as you saw of it, you saw it no more? A. That's right.

Q. All right, was there anything else that attracted your attention other than the fact you saw the train go past?

A. I saw the girl drive by, or the car, I thought it was the girl.

Q. I see. With reference to the train going by, when did you see her? Which was first?

A. That I can't say. [193]

Q. Oh, I see.

A. I don't remember, I just noticed both of them go by as I quit work, but it was no doubt pretty close together.

Q. No doubt——

A. No doubt pretty near the same time, but I don't remember just which one I saw first. I don't remember that at all.

Q. What you are saying is, your recollection is that you saw the car go past and you also saw the train, but you don't know what time?

A. No, I don't remember just how I saw them,

(Testimony of Lee Klocke.)

but I did see both of them. I waved at the girl as she went by. I am right close to the road.

Q. I see. All right, can you tell us about how far your place is from the crossing?

A. It is just 80 rods to my gate.

Q. 80 rods? A. To the gate.

Q. To your gate. Your property extends along the road toward the property of Mr. Everett, does it not? A. Yes, it does.

Q. Directionally along there. At that time, what was the situation with regard to the trees and shrubbery running along that fence line of yours facing the county highway? [194]

A. From my house to the county highway?

Q. No, along the county highway, the length of your property facing the county highway and up toward the Everett residence, what was the condition along there?

A. Well, right at my place there was some trees there, but after you get away from my place there isn't any trees.

Q. I see. And just beyond toward the crossing, is there considerable shrubbery along the side of the highway? A. There was brush.

Q. Brush between you and the crossing?

A. That's right.

Q. I see. Now, are you acquainted Mr. Klocke, with the crossing which is designated on the chart to which I am pointing? A. Yes, I am.

Q. Beg your pardon?

A. I am acquainted with it.

(Testimony of Lee Klocke.)

Q. You are acquainted with the crossing. Have you used it a number of times?

A. For 20 years.

Q. You have. All right, now, will you tell us, had you used the crossing a short time, or when did you last use the crossing, if you remember, prior to the accident which occurred on the 8th of March? [195]

A. Well, I couldn't say exactly, but I use it nearly every day. I might have used it that same morning, I don't remember.

Q. You don't remember. But you used it regularly, did you, up until the time of the accident?

A. Yes.

Q. I see.

The Court: By the way, his place is 80 rods from the crossing. I wonder if we could have that in miles or in feet. Is that a quarter of a mile?

A. That is a quarter of a mile.

Mr. McKevitt: 1,320 feet.

The Court: That is a quarter of a mile. All right, go ahead.

Q. (By Mr. Etter): Now, you have used this crossing, as I gather, and had used it a number of times prior to the accident up until the date of the accident. Will you describe the crossing to the jury, Mr. Klocke, the approach to it and the crossing itself, just prior to this accident?

A. Well, there is an incline, you go upgrade across the track.

(Testimony of Lee Klocke.)

Q. Would you step down with the pointer and just describe that as best you can?

A. When you approach the crossing there, there is an [196] incline, you go upgrade, and this crossing, the minute you leave that crossing, you are in a turn to go south on this road (indicating). If you do go south, there is three ways to go, you can go straight ahead or follow the track. But as we leave this crossing, we turn immediately after you cross this crossing. It is right at the point——

Mr. McKevitt: What is at the corner? What did he say was at the corner?

A. This is a corner right here; in other words, it is a rounding corner where we cross this track, we turn and go south on this here, and there is a grade that you go up to get over this track.

Q. (By Mr. Etter): Now, what I would like to have you do, you have got us coming back in reverse, but I would like to have you tell us about the situation when you go up in the northerly direction and on over on the public highway from your side of the railroad track.

A. We approach this crossing right at the corner and cross it. That is about all there is to it, you just go up a grade and over the crossing.

Q. What kind of a grade is that, Mr. Klocke, would you say, as to how high it is above the road? Would you say it was a sharp grade, at least so far as driving it is concerned? [197]

Mr. McKevitt: I object to the form of that question, the "sharp."

(Testimony of Lee Klocke.)

Q. (By Mr. Etter): What type of a grade is it for a man driving an automobile?

Mr. McKevitt: Object to that question. We have already got in evidence the mathematics on the situation.

The Court: Well, I think he may describe it in his own words.

Do you understand the question, Mr. Klocke? He asked what kind of a grade it is.

A. Well, I would say it is just an incline to go over the top of that track. Just how high it would be, I don't know exactly, but you do have to go up an incline to go over the track.

Q. (By Mr. Etter): All right, and is there a curve as you cross over the track to stay on the highway? I mean, what type of a curve is that?

A. This right here (indicating)?

Q. Yes.

A. Well, in order to come this way, it is rather sharp, you come right back down. In other words, this road, if it run straight south and this is straight east (indicating), this would be almost——

Q. Would be a 45 or 90 degree curve?

A. I don't know just what you would call it. It might be a straight "L." [198]

Q. All right, in driving, when you have driven it, how do you proceed? Do you proceed in high, that is, when you are going over it, or do you change gears?

A. Yes, we usually shift gears, it is a pretty sharp corner, and it really is a little rough on

(Testimony of Lee Klocke.)

account of making this corner. The plank that lays in front of the rails, a lot of times, is pretty bare on account of you make a corner and your wheels kick the gravel out all the time.

Q. I see.

A. That is, by turning, you throw this gravel out, but like the other side probably wouldn't do that, because you drive more straight on to it, but you turn immediately would cause the gravel to go out.

Q. I see. All right, now, when you are driving, when you have driven, say, immediately prior to the accident, Mr. Klocke, immediately prior to this accident, you have driven on it, can you tell us about the visibility that you have to see up the track in an easterly direction, as the map indicates, towards Ellensburg, as to oncoming trains? What is the situation there?

Mr. McKevitt: Well——

A. Actually see back——

Mr. McKevitt: What point are you referring to now? How far from the crossing? [199]

Mr. Etter: Well, I want him to tell starting where it appears, oh, within 25 or 35 or 40 feet.

Q. Just pick a point out on that map, if you wish.

A. Well, if you were back—I have never measured it, don't know exactly, but if you were back, I would say, 30 feet, you would be looking pretty much down the track this way (indicating). It

(Testimony of Lee Klocke.)

would be very easy to see a train coming from the north or——

Q. From Seattle?

A. Yes, this way. This way would be a little harder to see because you have to get pretty close to the track to look back this way (indicating).

Q. And why is that? What reasons are there for that?

A. Well, because you are coming in on a curve and your car, in order to be facing east, would have to almost make the turn and you are right on the turn right here (indicating).

Q. I see. And when you have driven your car up there, can you tell us what point you have reached in distance from the crossing before you are able to see up through the underpass or the overpass, if you can?

A. Well, I wouldn't say just exactly where it would be to look back, because I never did measure that, but I know we do get awful close to the track to look back to get a clear vision. [200]

Q. To get a clear vision? A. That's right.

Q. Do you know what the condition of the planking—you can take the witness chair.

(Witness resumes stand.)

On the day of the accident, did you have occasion to examine or to observe the planking of the crossing or the condition of the crossing, speaking of it now as the southerly approach; in other words, the approach that you have if you were driving from your place over to the public highway? Did

(Testimony of Lee Klocke.)

you have a chance to examine that planking that day?

A. Well, I never looked at it particularly, but I didn't notice that it was much different than it usually is. There is times it was worse and I think there was times it was better.

Q. I see. I will hand you the Defendant's Exhibit 30, which is indicated by the tag as Nos. 1, 2, 3 and 4, panorama, camera 25 feet south of the crossing facing east and north, showing view of driver approaching crossing. It was taken a couple of days, I believe, wasn't it, Mr. McKevitt—

Mr. McKevitt: March 10th, two days after.

Mr. Etter: After the accident. [201]

Q. Now, handing you this exhibit, I want you to examine, or can you see the condition there of the grade crossing and the planking?

A. Well, I have seen it look like that and I have seen it look better and I have seen it look, you might say, worse.

Q. I see. But would you say whether or not that is the condition that you noted or about that condition on the day that this accident occurred on the approach on this planking?

A. Pretty much so, about like that, I would say.

Q. I see. Did you have any occasion to take any measurements of how far down the approach was from the grade crossing?

A. No, I never.

Q. You did not? A. No.

(Testimony of Lee Klocke.)

Q. I see. Did you state that you had seen this crossing in that condition before that, too?

A. Yes, I think I have.

Q. Have you seen it in any condition worse than is indicated on the exhibit?

Mr. McKevitt: Well, I object. You mean you are referring now to the day of the accident?

Q. (By Mr. Etter): Well, have you seen it when the [202] approach to the plank was further down below the actual rail crossing than it appears on the exhibit?

Mr. McKevitt: I object to that question as leading and suggestive.

The Court: Well, I think not, it is whether he had seen it that way or not. Have you?

A. Well, I don't know, when a picture that way, I have seen it pretty rough and then I have seen it when it was fresh fixed up, why, it was pretty smooth. But as we said before, it is in a turn and they could fix it, but it didn't last because you turn and you kick it right out again with your car.

Q. (By Mr. Etter): I see. Now, did you notice the condition of the crossing, oh, some 10 or 12 days later or thereabouts, Mr. Klocke, whether there was any difference?

Mr. McKevitt: That is objected to, if your Honor pleases, what the condition 10 days after this was, as being incompetent, irrelevant and immaterial.

Mr. Etter: I think we have a right to show——

(Testimony of Lee Klocke.)

Mr. McKevitt: I object to counsel stating his position before the jury.

The Court: Will counsel approach the bench, please?

(Whereupon, the following proceedings were had [203] in the presence, but out of the hearing, of the jury:)

The Court: I think we have this come up in almost every one of these cases. What you are proposing to show now is that they changed and fixed it afterwards?

Mr. Etter: That's right, and cut down the brush.

Mr. McKevitt: That is no evidence of negligence.

Mr. Etter: That is evidence they could have made it safer, that's all it is, under the general rule.

Mr. McKevitt: We could have made it foolproof, but the law doesn't require us to do so.

The Court: As I recall, it isn't taken as evidence of negligence, but it has been admitted as showing a safer condition could have been maintained.

Mr. Etter: Could have been maintained, that's correct.

Mr. McKevitt: Well, I am objecting, if your Honor please.

The Court: Well, all right.

Mr. McKevitt: As being incompetent, irrelevant and immaterial.

(Testimony of Lee Klocke.)

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Q. (By Mr. Etter): The question again, Mr. Klocke, did you [204] have a chance a few days after, within a week or 10 days, to observe this same crossing?

Mr. Etter: Going to make your objection?

Mr. McKevitt: Well, it is understood I have an objection, a general objection, to this testimony?

The Court: You wish your objection to go to all this line of testimony without repeating it?

Mr. McKevitt: On the condition of the crossing on any period subsequent to the date of the accident.

The Court: All right, the record may show that. You may answer.

Mr. Etter: You may answer.

A. Well, I never paid much attention to the crossing after that. I never paid any attention to whether it had been fixed up better than it was or hadn't. I never really paid much attention to it.

Q. Well, didn't you advise me, Mr. Klocke, that you found——

Mr. McKevitt: Just a moment, I object to this cross-examination of his witness, I can see it coming. If he wants to claim surprise, that is one thing.

Q. (By Mr. Etter): I will ask you this, Mr. Klocke: Was there any different condition as to the brush that was along the right of way at the

(Testimony of Lee Klocke.)

crossing within a week or 10 days after this accident occurred? [205]

Mr. McKevitt: Same objection, now, as to any condition of brush within 10 days or any period after the date of the accident.

The Court: Very well, the record may show that. He may answer.

A. Well, I never paid much attention to it, I wouldn't answer whether there was something done. I think there was some work done, but I don't know just what day or how much was done. I didn't pay much attention to that.

Q. (By Mr. Etter): That is true, I'm not asking you that, but I'm asking if there was a difference between the brush that was along the railroad right of way up close to the crossing, if there was some difference in that within a week or so after this accident occurred?

Mr. McKevitt: Same objection, if your Honor pleases.

The Court: Overruled.

A. Well, I don't remember whether there was or not.

Mr. Etter: I think that is all, Mr. Klocke. [206]

Cross Examination

Q. (By Mr. McKevitt): Mr. Klocke, the Northern Pacific served a subpoena on you, or caused one to be served, sometime last week to come up here as a witness; is that not correct?

A. That's right.

(Testimony of Lee Klocke.)

Q. Now, taking first the condition of the crossing and referring to the planking on the outside of the rail towards your home, I will show you two photographs and you will bear in mind that it is agreed between counsel attorneys for either side, that these pictures were taken two days after the accident happened, and that one view shows with the camera up close to the crossing and facing east and the other one facing west.

A. This would be west?

Q. This one the camera is east of the crossing, that's right, and that is facing west, and this is west of the crossing and facing east.

Now, will you examine those photographs, please?

The Court: Will you give the numbers for the record?

Mr. McKevitt: Oh, I'm sorry, your Honor. Exhibits 17 and 18.

The Court: All right.

Mr. McKevitt: Defendant's.

A. All I can say, it is the crossing, all right.

Q. Are those photographs a fair representation of the condition of the crossing as it existed——

A. It is a picture——

Q. ——on the day of the accident? Are they fair representations?

A. The pictures are taken in the wrong angle for me to judge, which is on both sides. They were taken from the end; we approach from the side, and I can't see.

Q. Well, take a look at the planking on the out-

(Testimony of Lee Klocke.)

side of the rails in both pictures. That is what we are principally concerned with.

A. I would say that looks like it, all right.

Q. Fair representation as it existed on the day of the accident?

A. I would say so, pretty fair.

Q. By the way, I have discussed this case with you at some length in my office last night?

A. That's right.

Q. And I have a map which is a duplicate of that up there, have I not? A. That's right.

Q. And I call your attention now to Defendant's Exhibit No. 31. I showed you those photographs yesterday, did I not?

A. I don't believe I saw this one. [208]

Q. Oh, you don't believe you have seen this one?

A. I don't believe I did.

Q. Well, it is also agreed that Exhibit 31, which is the one you are looking at, is a panoramic view comprised of 1, 2, 3, 4 photographs, and when those four photographs were each taken, the camera was 180 feet south of the crossing, facing east and north. South of the crossing would be toward your home.

A. Uh-huh.

Q. And facing east and north toward the Milwaukee viaduct. Now, will you examine 31?

A. That looks very much like it looks there, very much so.

Q. And that photograph is a fair representation of the conditions that existed on March 8th.

A. I would say it is.

(Testimony of Lee Klocke.)

Q. All right. Now, make an examination of Defendant's Exhibit 30, which is a panorama comprised of four photographs, and in those photographs the camera is 25 feet south of the rail and facing east and north, as in this picture, only the difference is where the camera is located.

Examine that picture and advise the Court and jury whether or not it is a fair representation of the physical conditions that existed in and around that crossing on the 8th of March, 1952. [209]

A. I would say that looks pretty much like it.

Mr. McKevitt: May I make this observation to the Court with reference to this witness?

I have explained to Mr. Etter, he told me last night that he is very anxious to get out on our train this evening because his wife is going to undergo an operation tomorrow, and I told him if he wasn't used by Mr. Etter, that I would ask permission to put him on out of turn.

What I would like to do now is complete a brief cross-examination and make him my witness for just two or three questions.

The Court: You may do that.

Mr. McKevitt: And I had in mind we might run over two or three minutes.

The Court: Yes, all right.

Mr. McKevitt: Thank you.

Q. Mr. Klocke, you said you are about 80 rods, your home, from the crossing?

A. That's right.

(Testimony of Lee Klocke.)

Q. You are about the same distance from the crossing, approximately, as the whistle post is?

A. I am exactly, I am on the corner.

Q. Yes. And you were working out in your yard welding?

A. That's right.

Q. Using a welding machine? [210]

A. That's right.

Q. Did you have something over your head for protection?

A. I had a welder's hood on.

Q. And covers your ears?

A. Well, not exactly cover your ears, but you don't hear much with a welder's hood on when you are welding.

Q. The welding machine was making quite a racket, is that right?

A. That's right.

Q. But you saw Erna Mae go by your house and you waved at her?

A. I saw the car and I thought it was her and I waved at her.

Q. Yes. Did you see the car, that car you are referring to, before you saw the train or afterwards?

A. That I can't say.

Q. You can't recall?

A. Exactly.

Q. Well, was there a short interval of time or a long interval of time, or what, if you can tell, was the interval of time between seeing both vehicles, no matter which one you saw first?

A. I can't exactly say just exactly what one I saw first or just how long it was between, but I

(Testimony of Lee Klocke.)

happened to be looking up at the time, I did see the train and I saw the car. [211]

Q. Well, can you tell us how long after you saw Erna go by that you received information that caused you to go on up to the crossing? How long was that after she had passed by your place?

A. Well, it would be a short time, but just exactly how long, I don't remember.

Q. Having in mind the distance, a short time?

A. Yes.

Q. Did you estimate the speed of her car as she went by your home?

A. I never paid much attention. She never drives very fast or never had to.

Q. Well, what I am inquiring about, have you any independent recollection now of approximately the speed? If you haven't, why, say so.

A. I don't know how fast she was going.

Q. All right. You were advised by someone, what caused you to go up to the crossing? Was it information that you received from somebody, without telling what it was, or was it your own actual knowledge that something had happened? Which was it?

A. Someone called the house and my wife came out and told me that——

Q. I see. A. ——someone was killed.

Q. Then you jumped in your car and went up?

A. That's right.

Q. You had in mind at that time, then, that

(Testimony of Lee Klocke.)

possibly that was the car, the truck, Erna was driving that was involved? A. I think I did.

Q. Yes. When you got up there, after you arrived there, there was a gathering of quite a few people, wasn't there? A. That's right.

Q. Was Sheriff Dorsey there? Do you know Sheriff Dorsey?

A. I can't really remember who was there. I was interested in seeing what happened and I didn't pay much attention to anyone.

Q. Do you recall whether or not you saw a state highway patrolman?

A. I'm pretty sure I did.

Mr. McKevitt: Now, if the Court please, I will make him my own witness, if your Honor permits.

The Court: Well, let's see, do you have any redirect examination, Mr. Etter?

Mr. Etter: No, I haven't, but I have about three questions I would like to ask him on direct. I neglected to ask him, I couldn't find my notes on it.

The Court: Yes, all right.

Mr. McKevitt: On redirect?

Mr. Etter: On direct.

The Court: You want to reopen on direct.

Mr. McKevitt: Oh, I see, you want to reopen on direct. All right. Do you want me to finish with him, Max, now, then you can take him?

Mr. Etter: Certainly.

Mr. McKevitt: Very well.

(Testimony of Lee Klocke.)

Direct Examination

Q. (By Mr. McKevitt): I am making you my own witness for the purpose of these questions.

I will ask you whether or not you had a conversation with Mr. Everett at that crossing while you were both up there following the accident with reference to the truck? Did you have a conversation? You can answer that yes or no.

A. I can't remember whether we did or not.

Q. You have no recollection of any conversation at the crossing or near the crossing shortly after the accident?

A. Concerning the truck, I don't.

Q. Concerning the truck. Well, did you have any [214] conversation with Mr. Everett following the accident about an idling jet? A. We did.

Q. Where was that?

A. I can't say the exact spot we were in.

Q. Well, was it up at the crossing?

A. That I can't say.

Q. Well, was it immediately following the accident?

A. I think it was sometime right after the accident.

Q. And the same day?

A. Well, I think it was the same day. I don't know exactly whether it was the same day or not.

Q. Well, I will ask you, you gave a statement to one of the members of the Northern Pacific Claim Department two days after this accident, didn't you? A. I didn't hear you?

(Testimony of Lee Klocke.)

Q. You gave a written and signed statement to one of the members of the Claim Department two days after the accident, did you not?

A. Yes, I did.

Mr. McKevitt: I think for the purpose of this question, if the Court please, I will have to claim surprise, your Honor.

Mr. Etter: I don't think he can claim surprise yet. He hasn't asked him what his conversation was. [215]

The Court: He seems to have surprised everybody. I think you can use the statement to refresh his memory.

Mr. McKevitt: Yes.

Q. Examine that. As a matter of fact, I have shown you that statement before and you have read it, have you not? A. Yes, I think I have.

Q. Since you came up here to the trial?

A. That's right.

Q. And the sentence there in pen and ink is in your own handwriting, isn't it? A. It is.

Q. And that is your signature?

A. I think that is pretty much—

The Court: The only question before you, Mr. Klocke, is whether that is your signature.

A. That is.

Q. (By Mr. McKevitt): Now, I call your attention to this language, and it is bottomed on a claim of surprise, if your Honor pleases.

Mr. Etter: I would like to see it.

The Court: Yes, all right.

(Testimony of Lee Klocke.)

Q. (By Mr. McKevitt): Isn't it a fact, Mr. Klocke, that you informed the Claim Agent in this statement, informed me personally, that immediately following this [216] accident, in a conversation with Mr. Everett, that Everett advised you, referring to the truck, that he said the idling jet was plugged and at a slow speed, the truck would stall? Didn't Mr. Everett tell you that immediately after the accident?

A. I think that it was sometime after the accident, but not quite worded that way, I don't believe. I didn't probably say it just quite like you have it written there, but it meant probably the same thing. He said something about that the idling jet in the truck had bothered—or had bothered or plugged or something to that effect. Now, just how he worded that, I wouldn't say exactly, but I think that that was wrote that way, but it meant——

Q. Well, in the statement in your handwriting, you wrote this: "I have read this statement and it is correct," and that was before you signed it, wasn't it?

A. That's right, I looked it over and it was pretty much what we talked about.

Mr. McKevitt: I would like to have this marked and offer it in evidence as part of the claim of surprise.

The Clerk: Defendant's 32 for identification.

Q. (By Mr. McKevitt): By the way, you were not subpoenaed by the plaintiff until last evening

(Testimony of Lee Klocke.)

after you arrived in Spokane; that is true, isn't it? [217] A. That's right.

Mr. McKevitt: Offer it in evidence, your Honor.

The Court: The Defendant's 32 will be admitted.

(Whereupon, the said statement was admitted in evidence as Defendant's Exhibit No. 32.)

Mr. McKevitt: Well, I am through now, I won't take the time to read it to the jury. We are 10 minutes over the time. I have finished unless you are——

The Court: Well, I think we should go on.

Mr. McKevitt: All right, thank you, your Honor.

The Court: Finish if we can.

Mr. McKevitt: Reading to you ladies and gentlemen, Defendant's Exhibit 32:

(Whereupon, the contents of Defendant's Exhibit No. 32 was read to the jury by Mr. McKevitt.)

The Court: I think I should say to the jury at this time that these proceedings may be somewhat puzzling to you.

When counsel is examining a witness and claims surprise, that is the witness is testifying to something or failing to testify to something contrary to what counsel has a right to expect, then he has a right to cross-examine that witness, and that is what Mr. McKevitt proceeded to do here. [218]

Now, this statement of this witness isn't under oath and it is not evidence and shouldn't be considered by you as evidence. Its only purpose is to

(Testimony of Lee Klocke.)

affect the credibility of this witness as to what he has testified. The evidence here is his sworn testimony. You shall consider that in the light of this document in order to determine what credit and weight to give to the testimony he has given, but it is material only as it pertains to matters to which he has testified here and then only for the purpose of affecting his credibility. The rest of it regarding matters concerning which he has not testified should be utterly disregarded by you.

Do you wish to take exception to that, Mr. McKevitt?

Mr. McKevitt: Pardon me?

The Court: You have a right to take exception to my remarks, if you wish.

Mr. McKevitt: I have no exception.

The Court: I see.

Mr. McKevitt: Your Honor stated the law very accurately.

The Court: All right, go ahead. Are you through?

Mr. McKevitt: Yes, your Honor.

The Court: All right, any other examination, Mr. Etter. [219]

Mr. Etter: Just a couple of questions on direct, if I may.

The Court: Yes, all right.

Direct Examination (Resumed)

Q. (By Mr. Etter): Mr. Klocke, do you recall prior to this accident that any incident ever oc-

(Testimony of Lee Klocke.)

curred to you or your car as you crossed the particular grade crossing that is involved here?

The Court: To keep from getting—pardon me—to keep from getting too much confused here, you are now re-examining him on direct as your own witness?

Mr. Etter: On direct, yes.

The Court: I see.

Mr. McKevitt: Object to that question as incompetent, irrelevant and immaterial, as to what his experience may have been in operating a car at any time, as not evidence of negligence on the part of the railway company in any particular.

The Court: Let's see, will you read the question?

(The question was read.)

The Court: Well, he may answer it. [220]

A. Oh, I can't recall of anything ever happening, although I respect that corner pretty much.

The Court: Well, that relieves the Court of the responsibility for the law.

Mr. Etter: That is all, Mr. Klocke.

The Court: Any other questions?

Mr. Etter: That is it.

The Court: Well, in view of the fact that we have——

Mr. McKevitt: As far as the Northern Pacific Railway Company is concerned, this witness may be excused. I don't know whether Mr. Etter wants him or not.

The Court: May the witness be excused?

Mr. Etter: Yes, your Honor.

(Testimony of Lee Klocke.)

The Court: All right, you may be excused, then, from further attendance here, Mr. Klocke.

(Witness excused.)

In view of the fact that we have run over 15 minutes, I think we should recess until 2, rather than 1:30.

. So if you will all bear that in mind, we will recess until 2 o'clock and the jury will be excused until that hour.

(Whereupon, the trial in the instant cause was recessed until 2 o'clock p.m., this date.)

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had:)

The Court: All right, proceed.

Mr. Etter: Call Mr. Scobee for adverse examination, please.

FRANCIS WILLIAM SCOBEE,

called and sworn as an adverse witness by the plaintiff, was examined and testified as follows:

Direct Examination

Q. (By Mr. Etter): Will you tell us your name, please, your full name?

A. Francis William Scobee.

Mr. McKevitt: Keep your voice up, Mr. Scobee.

A. Francis William Scobee.

(Testimony of Francis William Scobee.)

Mr. Etter: Have to hear you way back to the end here, Mr. Scobee.

Q. And what is your occupation, Mr. Scobee?

A. Locomotive engineer on the Northern Pacific.

Q. And how long have you been an employee of the Northern Pacific Railroad. [224]

A. Employed by them since 1936.

Q. Since 1936. And what is your age now, Mr. Scobee?

A. 36. I will be 37 next month.

Q. And how long have you been an engineer for the——

A. Since 1945, June.

Q. Since 1945. What types of equipment, locomotive equipment, have you used during the time that you have been an engineer with the Northern Pacific Railroad?

A. Well, the Northern Pacific has quite a few types of locomotives, steam and Diesel. We have passenger Diesels——

Mr. McKevitt: Keep your voice up, Mr. Scobee. As Judge Driver remarked, the acoustics here are not altogether too good and you are talking a little too fast. I want to hear you.

The Witness: Okay.

Mr. McKevitt: Please.

A. Well, the Northern Pacific has quite various type of engines. They still have the steam engines in service. I have run all kinds of steam engines and the passenger Diesels and the freight Diesels.

(Testimony of Francis William Scobee.)

Q. (By Mr. Etter): The passenger Diesels and the freight Diesels? A. Yes. [225]

Q. Now, how long have you been employed or on the run, that is, the particular run that you were on on March the 8th of 1952?

A. Well, that particular run, I was an extra engineer.

Q. You were an extra?

A. The regular man had laid off.

Q. He had laid off? A. Yes, sir.

Q. Were you on the extra board as an engineer at that time? A. Yes, sir.

Q. And how long prior to that time?

A. I had been working the extra board, oh, a year or year and a half at that time.

Q. A year to a year and a half at that time. And on the extra board, did you have employment not only on that particular scheduled run, but on other runs in and around Ellensburg?

A. Yes, sir.

Q. And on this particular time, you had moved up, and the engineer on that run had laid off and you were handling that particular train?

A. That's right.

Q. How many times had you handled it through that same run? [226]

A. That particular run, I would say about 12, 15 times, on that particular run.

Q. About 12 or 15 times on that particular run?

A. Yes, sir.

(Testimony of Francis William Scobee.)

Q. That train is known as No. 5, am I correct?

A. That's right.

Q. And it is Diesel power, is it not?

A. Yes, sir.

Q. What is your braking power on that, Mr. Scobee?

Mr. McKevitt: If you know.

Q. (By Mr. Etter): What is your brake system?

A. I really don't know what the brake power is. I know how much air I carry and to that equivalent, I don't know any more.

Q. I see.

A. Because I have never tried to handle——

Q. How many cars, that is, passenger cars or baggage cars, were you pulling on that date?

A. I believe it was either seven or eight. I can't remember now just what it was.

Q. It was either seven or eight. And do you know what the length of a passenger car of that type is that you were pulling that day?

A. I believe they run about 70 feet.

Q. Is it closer to 65 or is it 70? [226]

A. To tell you the truth, I don't know.

Q. I see. But it was seven or eight cars, you believe?

A. Yes, sir.

Q. And how many Diesel units?

A. Three.

Q. Three? A. Three units.

Q. Beg pardon?

A. Three units on that particular day.

(Testimony of Francis William Scobee.)

Q. There were three units on that particular day. And what is the length of each one of those units?

A. Well, they run about 50 feet, a little better.

Mr. McKevitt: Each unit?

A. Each unit.

Q. (By Mr. Etter): 50 feet or a little better?

A. Yes.

Q. I see. What I have done here is a little calculating. If you had seven cars, 70 feet, and three units of 50 feet, that is, of your Diesel, the overall length of your train with seven cars would be approximately 640 feet?

Mr. McKevitt: If you know.

Q. (By Mr. Etter): If you know.

A. Well, I believe it runs around that, yes. I am not positive that we had that many cars. We might have had [228] one more in there.

Q. Well, if you had eight cars in there, you have another 70 feet, or possibly 710 feet, somewhere thereabouts? A. Abouts, yes.

Q. In other words, do you know whether it was possible you might have been hauling six cars, just so we can get exact on that, if we can?

A. I believe we had more than six.

Q. In all probability, as you say, it was seven or eight?

A. Yes. But there might have been one car one way or another there. I am not positive about the cars we had on that train that day, I can't memorize that far back.

(Testimony of Francis William Scobee.)

Q. Now, what system, without going into the matter of power application, what system, what brakage system, do you have on those Diesels?

A. Westinghouse.

Q. And is that air brake system an air brake system that works both with the Diesels and all of the passenger cars? A. That's right.

Q. And when you use your braking system, so far as the brakage that is applied, is it applied on the Diesel and on all of the cars in your train?

A. Could be, yes. [229]

Q. Could be? A. It depends.

Q. All right, would you explain it to me, please?

A. An explanation on that is this: When we are braking a train, well, in emergency, we'll say in emergency application of the brake valve, which we call on the railroad is "big hole," is the full amount of air goes through the engine and the train and it dynamites simultaneously the train and the engine.

Q. A "big hole," actually, is dynamiting a train, isn't it?

A. That's right. In other words, when you make a "big hole" or dynamiting the train application, you are dumping all your reservoir pressure onto your brake shoes on your engine and your train.

Q. And your train, that's correct. How much air do you carry?

A. Well, on a passenger, we carry 110 pounds air pressure on the train line.

Q. 110 pounds of air pressure on the train line?

(Testimony of Francis William Scobee.)

A. The train line, that is the air that goes through your coaches.

Q. I see. Now, do you know what the weight of those Diesel units is?

A. Well, they run around 300, oh, about 375 tons. [230]

Q. That is each unit or the three?

A. No, that is three of them together.

Q. The three units together? A. Yes.

Q. A Diesel unit is about 115 to 130 tons, isn't it, with the varying Diesels?

A. Right around there.

Mr. McKevitt: You are speaking of the three Diesel units, Mr. Etter, that were in operation that date?

Mr. Etter: Yes.

Mr. McKevitt: What you are asking the witness about?

Mr. Etter: Yes.

Q. If there is any mistake, I have reference to the three units that you were using on the date in question. A. Yes.

Q. That is, March the 8th of 1952.

A. I really don't know the actual weight, but it runs between 115 and 130 ton to the unit.

Q. 130 ton, that is, as to each one of the three units? A. Yes, that's right.

Q. Do you know or have you any idea of the weight of one of the passenger cars?

A. No, I don't.

Q. You do not? [231] A. No.

(Testimony of Francis William Scobee.)

Q. Now, on the date in question, Mr. Scobee, your originating point on your run was where?

A. Yakima.

Q. At Yakima? A. Yes, sir.

Q. And do you recall about what time it was you left Yakima?

A. About 1:40 in the afternoon.

Q. About 1:40? A. No, 1:35.

Q. And have you any idea or do you recall about when it was or what time it was that you came into the Ellensburg yard limit?

A. Well, I can't recall that time.

Q. You can't recall that?

A. No, not coming into Ellensburg.

Q. Do you recall what time you got to the Ellensburg station?

A. That was quite awhile ago, I can't recall.

Q. You don't recall that?

A. It was on time or about, and that was around 2 o'clock or maybe a little bit after.

Q. On time, which would be 2 in the afternoon or——

A. Well, I say that is about what time it was.

Q. Within a few minutes either way?

A. The time schedules have changed since then and that has been two years, that is quite awhile ago.

Mr. McKevitt: Keep your voice up, please, Mr. Scobee.

Q. (By Mr. Etter): Assuming, Mr. Scobee, 2

(Testimony of Francis William Scobee.)

o'clock was the scheduled time or thereabouts, you were on time? A. Well, I'll say yes.

Q. Approximately so?

A. Approximately on time, yes.

Mr. McKevitt: Is that coming into Ellensburg?

Mr. Etter: That is coming into Ellensburg, yes, Mr. McKevitt.

Q. Now, are you familiar with the Ellensburg railroad yard, that is, the yard limits of the yard, generally? A. Yes, sir.

Q. Would you say that is a fairly large yard?

A. Yes, it is.

Q. It is, is it not? A. Uh-huh.

Q. Do you know what the length of the yard is between yard limits?

A. In feet, no, but all I can go by is it is about half a mile, the yard limit board, we'll say.

Q. Yard limit to yard limit? [233]

A. Well, yard limit to yard limit is, oh, I don't know just what the distance is on that. I figure the yard limit board is approximately, we'll say, a half mile before entering the yard each way.

Q. Before entering the yard each way?

A. But what the distance is between the two, I couldn't tell.

Q. I see, all right.

Mr. McKevitt: His answer is one-half mile before you hit the first yard limit board?

A. Well, we'll say the yard limit board is half a mile east coming into the yard and a half a mile

(Testimony of Francis William Scobee.)

on the west end coming in from the west. By feet, I wouldn't know, I never measured that.

Q. (By Mr. Etter): Is there some distinction between the yard limit and the yard itself?

A. Well, the yard limit, that is in a working territory in a yard where anybody can do any switching, where you would have to come in prepared to look out for them yard working conditions.

Q. When you reach the yard, is that right?

A. That's right.

Q. All right. Now, when you come into Ellensburg, where did you stop your equipment with relation—I imagine you came right in to and stopped at the depot, isn't [234] that correct?

A. Usually stop at the station so the passengers can get off at the station platform right opposite the depot.

Q. Right opposite the depot? A. Yes, sir.

Q. Do you recall that you did that on that day?

A. Yes, sir.

Q. How much of a stop, of a scheduled stop, is there or was there at Ellensburg on that date?

A. Well, I would say five minutes.

Q. Beg your pardon?

A. Five minutes.

Q. Five minutes? A. Yes, sir.

Q. All right, did you do any switching on that date while you were in the Ellensburg yard?

A. No, sir.

Mr. McKevitt: What was your answer?

A. No, sir.

(Testimony of Francis William Scobee.)

Q. (By Mr. Etter): Or change any cars, add on any or take any off? A. No, sir.

Q. Your train remained the same as its makeup originating in Yakima?

A. That's right. [235]

Q. I see. And other than to come into——

Mr. McKevitt: Pardon me, Mr. Etter. You used the statement that the train originated in Yakima.

Mr. Etter: Yes.

Q. Your run originated in Yakima?

A. My run originated in Yakima.

Q. That is what I mean.

A. But the train was made up further on east.

Q. What I should say is this: Was the train's makeup the same when you arrived at Ellensburg as it was when you took over the equipment on the run of yours which originated in Yakima?

A. Yes.

Q. All right. Now, when you got to Ellensburg, as I gather it from your testimony, you discharged your passengers at the depot stop?

A. Yes, sir.

Q. And the train remained in the same condition, there was no taking of cars on or off, and you stayed there during the stop before you left to go in a generally westerly direction, at least toward Seattle? A. That's right.

Q. There was no train movement?

A. No.

Q. Until you left, is that correct? [236]

A. That's right.

(Testimony of Francis William Scobee.)

Q. All right. Now, do you recall when it was that you left Ellensburg station?

A. It was sometime after 2 o'clock, but to pin point it, I couldn't tell you. It was nearly on time.

Q. Nearly on time. Now, do you know what distance it is, approximately, Mr. Scobee, between points designated A, where you were, or, rather, where your train was at the depot for the discharge of passengers, and B, referring to the grade crossing where the accident occurred on the afternoon of March 8, 1952?

A. About four miles.

Q. It is about——

A. Around about there.

Q. It is around about four miles. And after you left Ellensburg and started in a westerly direction, what is your next stop, scheduled stop?

A. My next scheduled stop is Cle Elum.

Q. Your next scheduled stop is Cle Elum. Can you tell us what your time of departure—you say you don't recall exactly?

A. I don't recall.

Q. You don't recall exactly. Do you know, Mr. Scobee, what distance the track follows a straight pattern without noticeable curves from the time it leaves the [237] Ellensburg station?

A. Well, after you leave the Ellensburg station, you round a curve right after you leave the station, then it is a straight line in there all the way from there, all the way from the station after you round that first curve, after departure from the station.

Q. All the way from that curve?

(Testimony of Francis William Scobee.)

A. All the way for about seven miles, yes, sir.

Q. Do you know about approximately the distance that you make your curve before you hit this straight stretch of seven miles going west from Ellensburg?

Q. It is pretty near immediately after you leave the Ellensburg station, you got a straight piece of track.

Q. So it would be reasonable, could we assume, then, that there is a straight piece of track for almost seven miles, and that prior to reaching the crossing where this accident occurred, that the distance would be almost four miles, having due regard for the small distance before you make the curve and go into the seven-mile stretch?

A. Close to four, yes.

Q. Close to four.

Mr. McKevitt: You mean, if I understand you, approaching the crossing from the east, you have approximately four miles tangent or straight stretch of track; is that [238] correct?

Mr. Etter: That is correct.

Mr. McKevitt: Is that your testimony?

A. Close to four.

Mr. McKevitt: All right.

A. After you depart from that curve at Ellensburg.

Q. (By Mr. Etter): So counsel understands it, when you mean close to four, you mean it would be four miles if there wasn't the small amount that you started out with on the curve?

(Testimony of Francis William Scobee.)

A. That's right, it is about four miles to the depot to that crossing, and that curve is just—well, just a few feet. It is, oh, a couple of hundred feet, I guess, from the depot. We'll say you hit this curve and after you round that, then you got a straight stretch, oh, better than three miles, pretty close to four, I would say.

Q. All right. Now, Mr. Scobee, on the date in question, after you left the Ellensburg station, can you tell us, can you give us an idea of the speed of your train when it reached the curve and it started out on this straight stretch?

A. Well, the speed of my train, I couldn't tell then, because we changed train crews at Ellensburg.

Q. I see, at Ellensburg. [239]

A. And it is my duty when we change train crews——

Mr. McKevitt: Keep your voice up, please.

A. It is my duty when we change train crews, that we have to make a standing test with the air brakes.

Q. (By Mr. Etter): Yes?

A. And the new brakemen and conductor that are getting on the train have to check them brakes.

Q. All right?

A. And then when we depart and are on the move, I have to make a running test, what we call a running test with the brakes, and the brakemen, they hang out from the side of the train and see if the brakes are working.

Q. When you make this running test of the

(Testimony of Francis William Scobee.)

brakes, at what speed do you make your running test?

A. The speed reaches up to about 15 miles an hour.

Q. 15? A. Yes.

Q. You make a brake test at 15 miles an hour?

A. Yes, because I have the throttle open and in a pulling way, so if I don't stop the train when I set the brakes, I have got to have some pulling power to keep my train moving.

Q. And you keep it moving? A. Yes.

Q. And you keep it that speed when you give the braking [240] power and they, of course, are out observing; is that correct?

A. They are observing, and then I am checking my speed to see—I can tell, we'll say, if I reached a speed limit of 15 miles an hour and I make an application of the brakes of 10 pounds, we'll say, my speed will drop back with the throttle maybe to 10 miles an hour. That gives——

Q. You don't make any "big hole" application?

A. No, no.

Q. This is a 10-pound application?

A. What we call a service application.

Q. A service application, that's right.

A. By making that application and watching my speed and watching back at the brakemen, they give their "high ball" if things are satisfactory with them, and then I check my speed and I can tell the way my train is slowing down with the throttle that my brakes are working.

(Testimony of Francis William Scobee.)

Q. And when you made your brake test, it was okay, and you got the "high ball"?

A. That's right.

Q. Right? And then you started into your run, is that right? A. That's right.

Q. Do you know how far that you were from Ellensburg when [241] you made the test and before you started your regular run?

A. Well, we'll say I was about a train length or train length and a half by the time I made these tests.

Q. And after you made the test, then you opened the throttle and started?

A. That's right.

Q. All right, and will you tell us the distances at which you reached any particular speed?

A. Well, after leaving Ellensburg that particular day, they was doing some bridge work about two miles from the station and there was a speed limit of 35 miles an hour over this particular piece of track, and I guess——

Mr. McKevitt: How many miles an hour?

A. About two miles, around about two miles.

Mr. McKevitt: No——

Mr. Etter: 35.

Mr. McKevitt: Your speed limit was 35 miles?

A. 35 miles an hour over this particular piece of track.

Q. (By Mr. Etter): That was zoned for 35 on that date, isn't that right? A. That's right.

Q. All right. And I assume that you maintained

(Testimony of Francis William Scobee.)

your zone speed of 35 miles an hour that first two miles?

A. The first two miles I had got up to higher speed than that. [242]

Q. You had got up to a higher speed?

A. Yes. And when I came into this slow speed, I reduced my speed to 35 miles an hour for about a quarter of a mile until I had reached far enough for the rear end of my train to get over this slow piece of track.

Q. I see. Then, the whole two miles wasn't the 35 mile speed?

A. No, just over this particular piece.

Q. So what you did, for the first part of it, you reached for the first part of this two-mile portion, you reached a speed in excess of 35, but then slowed down and throughout the area of the speed zone you maintained 35 until you left the area?

A. That's right.

Q. Which was about two miles, or more or less, from the crossing?

A. That's right.

Q. Grade crossing?

A. That's right.

Q. All right, then you increased your speed?

A. That's right.

Q. All right, what speed were you traveling after you left the speed zone plus an additional mile?

A. Oh, I probably maintained a speed and was still [243] climbing, about 50 miles an hour, 55, in another mile.

Q. I see. In other words, when you were about

(Testimony of Francis William Scobee.)

a mile from the crossing, or 5,280 feet, you were probably maintaining a speed of 50 to 55 miles an hour? A. That's right.

Q. That's right. And going into the last mile and during the last mile, what speed did you reach?

A. I had probably got up to 60, a little better.

Q. Up to 60? A. That's right.

Q. And what speed had you reached when you were—Well, let me ask you this: There are some signals, are there not, that are about, oh, around 4,500 or 4,600 feet from the crossing, east?

A. Approximately, yes. I don't know, though, I have never measured it or never heard just how much it is.

Q. Would you say that is a fair statement of the distance of those? That is a block signal, isn't it? A. A block signal, yes.

Q. Would you say that the block signal is characterized by one of these poles up in the air with these green, red, and what not; isn't that right?

A. That is a block signal.

Q. Electrically operated, automatic operation?

A. That is a block signal. [244]

Q. Would you say, could you tell me whether or not the distance from those block signals to the crossing is about nine-tenths of a mile or somewhere in the area of 4,750 or 4,800 feet? Would that be it approximately?

A. If I told you, I wouldn't know, because I don't, I don't know just what the distance is.

Q. You don't know?

(Testimony of Francis William Scobee.)

A. I am very familiar with that track, but still I couldn't tell you in measurements just how far that block is from that crossing.

Q. Could you tell us about how fast you were going when you went past that block signal?

A. Well, I couldn't tell you.

Q. What speed did you reach before you came to the underpass, the overpass, rather, the Milwaukee overpass?

A. I had probably reached a speed of about 63, 64 miles an hour.

Q. 63 or 64. Do you know definitely?

A. Well, no, just only figured I was doing about that speed at that time.

Q. How did you figure that?

A. Well, coming on the overpass at that time, emergency came up there and I didn't get no chance to look at no speedometer. [245]

Q. All right, then, what was the highest speed that you reached before you got to the overpass?

A. To my estimation, it was 60 miles an hour, the last time I got to look at my speedometer.

Q. 60 miles an hour? A. Yes, sir.

Q. That last time you looked at it. And when was the last time that you looked at it?

A. Approaching the whistle post there coming into this grade.

Q. Approaching the whistle post?

A. Yes, sir.

Q. Do you know about how far east of the whistle post you were?

(Testimony of Francis William Scobee.)

A. I never measured it, I don't know.

Q. And you were proceeding then, you say, at what was indicated on your speedometer, or tape, I guess it is, isn't it? A. Uh-huh.

Q. 60 miles an hour? A. About that, yes.

Q. Would you have been a train length the other side of the whistle post, do you know, or closer than that to the whistle post?

A. I couldn't tell you. [246]

Q. But you do indicate that at least you recollect this speed by seeing the whistle post or being in some close proximity to it?

A. Yes. When I approach the whistling post like that, then my eyes are diverted to the crossing.

Mr. McKevitt: You are talking too fast and too low, Mr. Scobee. I have got to hear you.

A. You will have to pardon me. Right in here, it sounds like I am talking loud.

Mr. McKevitt: Well, you heard Judge Driver talking about our voice and how loud Mr. Etter and I talked. You talk as loud as both of us and then we will both hear you.

Mr. Etter: That will be quite difficult.

Mr. McKevitt: At least as loud as Mr. Etter.

A. Where was I?

Mr. Etter: You had just answered, I think, something about you hadn't looked because your attention was diverted by the whistle post or something.

A. Yes. When we arrive at one of those whist-

(Testimony of Francis William Scobee.)

ling posts, well, then your attention is diverted to the crossing.

Q. I see.

A. And, of course, your speedometer is down on a panel down to the left and you got to take your eyes down and look, if you are going to check your speedometer.

Q. I see. [247]

A. So at this particular point approaching this whistle post, of course, I have got to direct my attention straight ahead, and that is the last time I looked at the speedometer and it was approximately or about 60 miles an hour.

Q. That was the last time you looked at it?

A. Yes, sir.

Q. Now, the Diesel equipment that you operated that day, Mr. Scobee, were you and the fireman both up in the front part of the Diesel?

A. Yes, we were.

Q. And on those Diesels, the observation part or the operator's part, that is where the engineer and the fireman are generally, is right up in the very front end, is it not correct?

A. Close to the front end.

Q. Close to the front end. In other words, the front end of the Diesel comes up something like that (indicating) and there is a glass windshield right up here and you fellows sitting right up back of that glass windshield?

A. There is about an, oh, about seven foot difference there.

(Testimony of Francis William Scobee.)

Q. Seven foot difference?

A. Rounds up and then up to your windshield.

Q. Rounds up, but what I mean——

A. But straight figures, as far back as I sit, straight figures would probably be about seven to nine feet.

Q. Seven to nine feet, but there is absolutely no obstruction to view, is there? A. No.

Q. In other words, those windshields are large panels of glass and you have a perfect view all around looking straight ahead?

A. That's right.

Q. It is unlike the old steam jobs where you have to lean out the side? A. That's right.

Q. Considerable, is it not, from where you are set well back any number of feet from the front of the locomotive; these aren't like that at all?

A. No.

Q. Your throttle in a Diesel, is that directly in front of you, within reaching distance?

A. It is within reaching distance, but it is just a little to the left of me.

Q. A little to the left?

A. On my left-hand side.

Q. And your braking, how is that handled? Is that handled with a small bar, your air? [249]

A. It is on my right-hand side and a little up.

Q. A little up? A. Yes.

Q. Is it in the form of a bar, hand bar?

A. Yes.

Q. Can you tell me whether or not when you

(Testimony of Francis William Scobee.)

apply your air, you swing it left or right, or whether it is to you or from you?

A. You pull it.

Q. You pull it? A. Towards you.

Q. Speaking of the brakes now?

A. Talking about the brake, yes.

Q. Yes. And the throttle works how on the left side?

A. The throttle works the same way on the left side, you pull it towards you. That is opening it up.

Q. To open the throttle up, you pull it towards you, and to close it, you close it up, is that right?

A. That's right.

Q. And on the brake, in order to brake your Diesel, you pull the throttle towards you on the right?

A. To brake the Diesel, you have to pull it to you on the right.

Q. On the right. Now, is that brake or that throttle marked so that you can see the application of air [250] pressure with your use of the throttle? A. Yes, it has marks on there.

Q. It has marks on there? A. Yes.

Q. Which indicate the application, is that correct? A. We have gauges.

Q. Gauges? A. Air gauges.

Q. And you can tell from the gauges?

A. Yes, if I look.

Q. I see. Now, if you were going to give it a "big hole" or a dynamite stop and you were proceeding along at a clip of, say, 50 miles an hour,

(Testimony of Francis William Scobee.)

and you were going to apply a dynamite stop, having regard now to the place that you have your throttle and the brake and the manner in which they operate, will you tell us how you would do that, what you would do?

A. If I just wanted to go into emergency?

Q. Yes? A. And my throttle was open?

Q. Yes.

A. Shut my throttle off, push it away from me, and pull the brake valve clear over as far as she will go.

Q. Pull it over as far as it will go, is that correct? A. Yes, that's right. [251]

Q. All right. Having due regard now to the fact of your description of the three-piece Diesel unit which you were operating on that day, the fact that you were pulling seven or eight cars, can you tell us what length in feet would be required for you to stop that train if the train was proceeding at a speed of 60 miles an hour——

Mr. McKevitt: Go ahead, I'm sorry.

Q. (By Mr. Etter): ——and you applied a dynamite stop or “big holed” it, in the parlance of the railroad?

Mr. McKevitt: Object to that question on the ground that it is a hypothetical question and it doesn't include the factors which are necessary to enable this witness to answer, if he is able to answer, and his qualifications to answer the question of that kind have not been established.

There are a lot of factors, if the Court pleases,

(Testimony of Francis William Scobee.)

that enter into stopping distances which, necessarily, have to be included in a hypothetical question and certainly are not present in this question, the question being hypothetical in nature and not sufficient factors introduced to permit to answer as an expert.

Q. (By Mr. Etter): Were you present, Mr. Scobee, throughout these proceedings? Have you been present? A. Yes, sir.

Q. Were you here when Mr. Adams, the engineer, testified, [252] that is, I suppose, the civil engineer, certainly not a locomotive engineer? Were you here when he testified? A. Yes, sir.

Q. Did you hear him testify as to the percentage of grade leading from the various parts of the railroad extending in an easterly and westerly direction outside of the City of Ellensburg?

A. Vaguely, yes.

Q. Beg your pardon? A. Vaguely, yes.

Q. Well, you as an engineer, having run over there, are you acquainted with the fact that there is a slight grade upwards? A. Yes, sir.

Q. Beg your pardon? A. Yes, sir.

Q. And, likewise, that is standard gauge track, is it not? A. Yes, sir.

Q. What is standard gauge, four feet, eight inches or eight and a half inches, between the inside of the two rails? A. Inside rail.

Q. Inside the two rails?

Mr. McKevitt: Oh, say, on that, Max, so we will be in agreement—— [253]

(Testimony of Francis William Scobee.)

Mr. Etter: All right.

Mr. McKevitt: Gauge of the railroad, measured inside of rail to inside of rail—remember when I talked to you about that yesterday—four foot, eight and a half inches.

Mr. Etter: All right. As I understand it, then, the inside——

Mr. McKevitt: So that may be stipulated, your Honor.

Q. (By Mr. Etter): That is standard gauge, is it not? A. Yes.

Q. And you heard the testimony with respect to the grade, is that correct?

A. Vaguely, yes. There was ups and downs there and I haven't got them down in my mind just what it is.

Q. I see. All right, then, let me ask you this: Mr. Adams indicated, as I recall it, that the grade was slightly upward in very minimum percentage points. Do you understand that?

A. Different points, there was a variety of ups and downs.

Q. But minimum in most instances, is that correct? A. Yes.

Q. And you have operated over that line of road many times before? [254] A. Yes, sir.

Q. And isn't it a fact that the grade is very minimum at any particular point on that straight stretch? A. Very small.

Q. Very small. And those rails are uniform rails in weight and poundage, are they not?

(Testimony of Francis William Scobee.)

A. Yes.

Q. That are used generally on the main line of the Northern Pacific? A. Yes.

Q. Is that correct? A. Yes.

Q. All right, how was the weather that day?

A. Clear day.

Q. Beg your pardon?

A. It was a clear day.

Q. It was a clear day? A. Yes, sir.

Q. And was there any snow or slick or ice or otherwise on the rails that was visible to you?

A. The rail was dry.

Q. The rail was dry? A. Yes.

Q. When you made your practice stop, did your train react in the same fashion it had at other times when you made [255] your practice stop with respect to those rails?

A. What are you referring to by "practice stop"?

Q. Well, your checking your brakes, I should say, when you came out of Ellensburg?

A. The brakes were working good.

Q. I know, but was it uniformly the same operation, the same result as you had on other occasions?

A. Yes.

Mr. McKevitt: If the Court please, with reference to the previous question, counsel uses the term "practice stop." Now, that, as I understand it, is just coined by counsel himself. I don't recall any testimony from this witness that at any time—

(Testimony of Francis William Scobee.)

The Court: He meant the practice test of the brakes.

Mr. McKevitt: —that there was any practice stop. There is a difference between a practice stop and just a testing of brakes.

Mr. Etter: Of course, I changed it, Mr. McKevitt, and got all over it. The witness said——

Mr. McKevitt: I don't like that "practice stop."

The Court: Well, I think counsel changed that and said he meant practice test of the brakes.

Q. (By Mr. Etter): It was a practice test, wasn't it, it was a practice test?

A. It is a practice to make that test. [256]

Q. It is a practice to make that test?

A. Yes.

Q. And you did make that test to determine, of course, as you have said, the application of your brakes; is that right? A. Yes.

Q. Surely. And I think you said it was uniform in respect to other times that you had made the same test with respect to the same rule when you took on new men in the engine crew?

A. That's right.

Q. And would you say the tracks in all respects, then, were, as you say, dry? A. Yes.

Q. And the visibility was good? A. Good.

Q. Was there any defect in your operating mechanism that you noticed in your Diesel?

A. There was nothing wrong with the equipment at all.

Q. Nothing wrong with the Diesel?

(Testimony of Francis William Scobee.)

A. No.

Q. And on that, had you ever had occasion to dynamite a train on that particular run?

A. Not on that particular run I have never done it.

Q. Have you ever had occasion to dynamite Diesel equipment [257] when you were operating with a passenger behind you?

A. No passenger train.

Q. No passenger train. You have made dynamite stops? A. Only on freight.

Q. Only on freight. You know what they are?

A. Yes.

Q. I see. You had, of course, operated the particular train that you were operating that day, I think you said 12 or 15 times previously on that run?

A. I have operated about that many times.

Mr. McKevitt: Pardon me?

A. I have operated about that many times, but I couldn't pin point it down to how many times.

Q. (By Mr. Etter): Your run originated in Yakima, where does your run stop?

A. At that time, at Seattle.

Q. In Seattle? A. Yes, sir.

Q. During the time that you were operating the train on these various runs between Yakima and the City of Seattle over this particular line, I assume that the gauge of the track is the same all the way? A. The gauge is the same.

Q. And that you have different places where

(Testimony of Francis William Scobee.)

you have upgrades and where you are on the level during that [258] particular run of yours from Yakima to the City of Seattle? A. Yes, we do.

Q. And that at varying places under varying conditions, you have made stops of that train and starts of that train during those 12 or 15 times that you have operated? A. Yes, sir.

Q. Is that correct? A. That's right.

Q. That's right. And you were familiar with the operation of that train in the way it reacted to braking power? A. That's right.

Q. Is that correct? A. Very familiar.

Q. And you were familiar with the Diesel and the mechanical aspects of the Diesel and the way it reacted to braking power? A. Yes, sir.

Q. Is that correct? A. Yes.

Q. At varying speeds?

A. Yes, there is varying speeds that you have to try your air.

Q. That's right. [259]

A. That you get reactions.

Q. All right. Now, on this particular day, or, rather, I will ask you, with reference to the knowledge that you have and which you have testified to, I will ask you if you can tell us, in the operation of the particular train that you were operating on that particular day, which was composed of three units of a Diesel and seven or eight passenger cars, and the train was proceeding on standard gauge track, which was dry and in good condition, and you were proceeding at the slight grade as is indi-

(Testimony of Francis William Scobee.)

cated by your testimony, and that proceeding along in that particular equipment on the particular grade as described and on tracks in the manner in which I have stated them to be, with clear visibility and the other conditions which have been indicated in your answer, can you tell me in what length in feet it would be required to stop the train which you are operating with the equipment that you were operating, if you were to make a dynamite stop, proceeding at a speed of 60 miles an hour.

A. I don't—

Mr. McKevitt: Just a moment. I object to that on the ground that it is a hypothetical question in nature and he hasn't included in here the factors that are necessary to permit the witness to intelligently answer. And one of [260] them, and probably the most important one, your Honor, and about which this witness hasn't been interrogated, is the total weight of this train. There isn't a scintilla of evidence as to what this train weighed, and whether this man knows, I don't.

The Court: This question is whether he knows or not. You may answer that question.

A. I don't know.

Q. (By Mr. Etter): You have been an engineer for how long? A. Since 1945.

Q. Since 1945? A. Yes.

Q. Your testimony is now that with your experience in driving this train, you don't know when you can stop or what length you can stop it at any speed; is that it?

(Testimony of Francis William Scobee.)

A. Well, we don't make a practice of dynamiting the train only in emergencies.

Q. In emergencies? A. That's right.

Q. All right. A. So I wouldn't know.

Q. Beg your pardon?

A. We don't make a practice of it unless it comes up to emergencies, and then we dynamite our train, so I have no idea. [261]

Q. Have you ever received any instruction in your training as an engineer as to your braking power and the amount of braking power required to stop a train going at various speeds?

A. Experience is the best teacher.

Q. No, have you ever had any instruction in that?

A. We have instructions, I passed the test.

Q. You have had tests?

A. But we never took tests on taking trains out and dynamite them to see how far it was going to take to stop them.

Q. No, but haven't you had instruction and haven't you answered questions that relate to the braking power necessary to stop a train at a particular number of feet going a particular speed under all and various conditions as an engineer?

A. Well, your weights and everything change on all trains.

Q. Yes, but you have instructions, have you not, on that? A. Yes.

Q. Beg your pardon?

A. We have some instructions, yes.

(Testimony of Francis William Scobee.)

Q. And you had operated this train for 12 or 15 times prior to this date in question, and your testimony here now is that you don't know what amount of air or what pressure would be required to stop that train if you [262] had to stop it under an emergency?

A. I know what air I have got.

Q. Yes.

A. And I know what brake valves I've got on my engine.

Q. That's right.

A. And when an emergency comes up, there is only one thing to do and that is dynamite the train, and how far it is going to stop, I can't tell you.

Q. Your testimony here now is you haven't got the vaguest idea, as I understand it, you haven't got the vaguest idea, although you are taking this train along the track this day at 60 miles an hour, you haven't got the vaguest idea of how quick you could stop it if you were confronted with an emergency; is that your testimony?

Mr. McKevitt: If your Honor please, for the purpose of the record and so I won't be continually objecting, he is trying to force this engineer to make an expert out of himself as to stopping distances so as to establish certain allegations in his complaint.

Mr. Etter: If counsel has an objection, I wish he would make it, because I am prepared to make a speech, too, if that is what this is.

(Testimony of Francis William Scobee.)

Mr. McKevitt: Well, I am stating the reasons for my objection [263]

I will object to this line of examination for the reason that he is trying to qualify this man as an expert, and he hasn't given him the data on which to intelligently answer a question, if he is able to.

Mr. Etter: This man has testified he takes a passenger train at 60 miles an hour and he has been an engineer for nine years on the Northern Pacific Railroad and he has taken examinations and qualifications as an engineer and has pulled this same train for 12 or 15 times, and the Northern Pacific apparently takes the position that even though he is an engineer and entrusted with a passenger train, he isn't qualified to testify about the very job they have given him to do.

Mr. McKevitt: I object to that.

The Court: Just a minute.

Mr. McKevitt: I ask that the jury be instructed to disregard that statement.

Mr. Etter: And why?

The Court: I will instruct the jury to disregard all of the argument of counsel. It has nothing to do with your duties here, you pass upon the facts, so disregard all the argument.

I think that the witness has testified that he doesn't know. We will have to let him stand on that, that he doesn't know what it is. [264]

Mr. Etter: All right.

Q. Can you tell me this, do you know what application of air it would take to stop your train,

(Testimony of Francis William Scobee.)

or how many feet you would travel in that train, if you were going 20 miles an hour and you applied an emergency "big hole" or dynamite stop?

A. Well, as I say, your trains vary in weight, length, and conditions and everything varies, so I couldn't give you an intelligent answer. When running a locomotive with trains that vary in different weights, lengths and stuff like that, you can't give an intelligent answer, unless you are an expert on it and take that subject up.

Q. Well, you don't know the weight of any of your passenger cars, is that it?

A. No, I don't.

Q. That you have been hauling, you don't know what the weight of one of those cars is?

A. No.

Q. What other conditions did you have reference to other than the ones I have inquired about, Mr. Scobee?

A. Well, you have different engines, whether you are under steam power, Diesel power.

Q. I inquired of you, of course, as to the particular Diesel power you were using that day. [265]

A. Yes, we had a Diesel that day.

Q. So you have that in mind, you know the weight of your Diesel equipment and you know the system of the Diesel operation, that is, as to your throttle and as to your air brakes; isn't that right?

A. Yes.

Q. You know that? A. Yes.

Q. And you know the weight almost of your

(Testimony of Francis William Scobee.)

three units, I mean you would have that, and you know the number of cars and their length that you have; is that correct?

A. Approximately, about.

Q. So the only thing that you don't know is the weight of each one of those cars or the collective weight of the total, isn't that right?

A. Well, that wasn't given to me, but you handle that equipment and you make them air tests, you have the feeling of what you have got in brake tests, the standing test and the running test. You have got a feeling of just about how much that you can do and how much air to apply, and experience, it is the running of it and the handling of trains day after day, that it is just a feeling that you get from experience.

Q. Well, then, you don't have to know the weight of those cars, isn't that your testimony, in order to know how to use your brakes? [266]

A. Well, not always on passenger, but on freight we usually get the tonnage of the train we are carrying and the length of train and how many cars.

Q. What equipment are you operating now?

A. I am still working the extra board.

Q. You are still working the extra board?

A. I handle all kinds of equipment.

Q. Have you handled this particular run that we are talking about lately?

A. Not recently, no.

Q. When was the last time?

(Testimony of Francis William Scobee.)

A. Oh, I couldn't tell you. It has been, oh, six months or better.

Q. Six months ago or better?

A. I just—I am just guessing there because I don't know just exactly how long ago it was now.

Q. Now, you have told us that you have made 12 or 15 of those runs up until 1952. How many, in addition to those 12 or 15, have you made after this accident on March the 8th of 1952?

A. There has been quite a few.

Q. Well, how many?

A. I couldn't tell you.

Q. Well, have there been more than 12 or 15?

A. I wouldn't say, no.

Q. Beg your pardon?

A. Not on that particular run, no.

Q. Well, have there been 10 more since 1952?

A. I couldn't pin point it.

Mr. McKevitt: You mean the same equipment?

Mr. Etter: Same equipment?

A. I couldn't tell just how many, no.

Q. Well, you say there are quite a few, though?

A. Well, we have two extra boards, and as the years go by, my seniority gets a little more and I have moved out to the Auburn board where I live.

Q. I see.

A. And I work out to Auburn now where I live, and they have two extra boards and the senior extra board is in Auburn, and as my seniority grew, I moved to my home town.

Q. To Auburn?

(Testimony of Francis William Scobee.)

A. I don't work out of Seattle any more, so it has been quite awhile since I worked one of them passenger jobs.

Q. You work in freight now?

A. Freight mostly, yes.

Q. I see. But you had worked that about 12 or 15 times and you have worked it, as you say, quite a few runs after that? [268]

A. I have been on it a few runs afterwards, I couldn't pin point how many.

Q. Well, did you operate that passenger train enough times, as you say, to get the feel so that you were able to know when to apply braking power and how much? Did you operate it enough to do that?

A. That is experience, yes, you get the feel of them.

Q. Well, did you have enough experience to get the feel of it? A. Yes.

Q. And hadn't you had enough experience on March the 8th of 1952 to get the feel of it?

A. Yes, I had the feel of the train.

Q. You had the feel of the train? A. Yes.

Q. And if you have the feel of the train, it isn't necessary after you make these tests to know what your equipment weighs, isn't that correct, that is, the cars?

Mr. McKevitt: For what purpose?

Mr. Etter: Now, just a moment—

Mr. McKevitt: Well, I object to the form of that question.

(Testimony of Francis William Scobee.)

The Court: Well, let's have the question.

(The question was read.) [269]

Q. (By Mr. Etter): In order to determine your stopping distances? If you have the feel of the train, isn't that what you mean by the feel of the train?

A. To know how much air to apply, you mean?

Q. Yes? A. To stop that train?

Q. Yes?

A. Well, it is like I say, you have got to have experience in the feel of this train.

Q. That's right.

A. And coming into stations for stopping for passengers, you don't look down at your air gauge, you are watching mostly where you are going to spot your engine for a spot.

Q. Exactly.

A. So I don't see how much air I draw off, I just make my stop and make it as smooth as I can so I don't knock anybody down in the passenger coaches.

Q. Isn't it a fact that when you come into any passenger station, that you have yourself a spot along that main line, you know when you got that spot you have to give it so much air, that you are going to put it where you want it?

A. It is not that easy.

Q. Well, you know it becomes that easy after you get the feel, isn't that right? [270]

A. After you get the feel of it, you get so——

(Testimony of Francis William Scobee.)

Q. You can pick yourself out a spot and start an application and stop?

A. Not necessarily, your trains vary. In a passenger train, we'll say maybe this day they might put three baggage coaches on it.

Q. All right.

A. The next trip might be only two, so your distances change, so you couldn't diagnose one spot that you are going to spot that train at.

Q. Mr. Scobee, if you knew the weight of your train, the weight of those cars, you already know your brake pressure, don't you, or your brake—what was that, 120 pounds?

A. 110 pounds train line pressure.

Q. 110 train line. If you had the weight of those cars and the number of cars that were on there, and knowing the 110 pounds of air that you had, could you tell us then by giving this train a "big hole" how long or how many feet would be required to stop if it was going 60 miles an hour and you applied a full "big hole" or dynamite?

A. No, I couldn't.

Q. You could not? [271] A. No.

Q. Can you tell us who can?

Mr. McKevitt: Oh, I object to that, if your Honor pleases.

The Court: I will sustain the objection to that question.

Mr. McKevitt: He wants us to furnish expert witnesses for him now.

The Court: I will sustain an objection to that.

(Testimony of Francis William Scobee.)

Q. (By Mr. Etter): How do you tell what your ability or your braking distance is under varying speeds? How do you determine that yourself?

A. By experience.

Q. By experience?

A. Of braking into stations, my station stops, and getting the feel of my train on your tests.

Q. Well, can you tell——

A. Your running tests.

Q. Can you tell us from your experience, your braking experience, how fast you can stop a train operating at certain speeds? Can you tell us that?

A. Well, the trains vary in length and weight and everything.

Q. That's right. So can you tell us the answer?

A. If we took different trains, I couldn't tell you, no. [272]

Q. Which ones can you tell me about?

Mr. McKevitt: Well, I object to the form of this question, if your Honor pleases. He is trying to qualify this witness as an expert in stopping distances under certain conditions by an emergency application. I assume a train of this character, I understood this witness to say he can't tell, and I think that it is a question of proving a case by expert testimony and it should be proved by some witness that he produces himself, instead of trying to make this engineer an expert on behalf of the plaintiff.

I object to this as being an improper examination under the adverse rule.

(Testimony of Francis William Scobee.)

Mr. Etter: I doubt, your Honor, that I am making him an expert; I am trying to find out if he is qualified to tell us. I don't know of anybody better than the engineer that I could get on that. He has given me these qualified answers and I merely asked under what conditions he can testify. He says when he gets the feel of the trains and they are all different. Well, he has operated a lot of different ones; I want to find out as to each of the different ones as to whether he can tell us.

The Court: I will excuse the jury for the mid-afternoon recess.

(Whereupon, the following proceedings were had in the absence of the jury:) [273]

The Court: I think the adverse party rule is set out in Rule 43, Subdivision (b), of Rules of Civil Procedure, and this witness is no longer, of course, an adverse party——

Mr. McKevitt: No.

The Court: He has been dismissed as such, he is not an adverse party, and he isn't an officer or managing agent of the Northern Pacific Railway Company, so that the only right you would have to cross-examine is under 43(b), which is:

“A party may interrogate an unwilling or hostile witness by leading questions,” and: “A party may call an adverse party or an officer, director, or managing agent of a public or private corporation,” etc., but he is not in that class, and I don't think you would be justified in going any further in this line of examination.

(Testimony of Francis William Scobee.)

Mr. McKevitt: I think we had that deal in the Stintzi case, you remember, Mr. MacGillivray's idea as to who is a so and so in connection with the railroad company.

Mr. Etter: It wasn't as to an engineer, however, at that time. [274]

Your Honor, departing from that, it seems to me that the only person that is qualified to tell us anything about this particular train is the man that operates it. I mean, if there is anybody that can tell us anything more about starting it or stopping it than the engineer, I don't know who it would be.

The Court: Well, I don't recall any reluctance or hesitancy on this witness' part in telling you exactly what happened on the day of this accident, but now you are asking him hypothetical questions.

Mr. McKevitt: That's right.

The Court: As to how far it would take to stop this particular train. Well, unless he as a locomotive engineer has learned by experience, obviously, he isn't going to be able to sit down and draw a graph for you and say friction so much and weight so much and distance and time, and so on, and work out one of these formulas that it takes a mechanical engineer and a very good one, I should think, to figure out.

Mr. Etter: I grant that. Your Honor, I certainly don't think I have inquired of this witness as to that formula. He said it is a matter of experience and everything, and if he comes within 2 or 300 feet, I'm not questioning it, that's all I want.

(Testimony of Francis William Scobee.)

The Court: Well, he has a right to refuse [275] to estimate or guess, and he says that the only way he can tell is by experience, and he has never had any experience stopping a train by dynamiting it so he hasn't any basis of experience and he declines to estimate on any other basis, and I think he has a right to do so.

Court will recess for 10 minutes.

(Whereupon, a short recess was taken.)

Mr. Etter: Your Honor, on the matter of the examination of the witness and after examining the complaint, I would like to call your Honor's attention to some relevant allegations which we have made.

For instance, on Page 3, (a), we have said that they drove the train in a negligent——

The Court: That is what paragraph?

Mr. Etter: Subparagraph (a) on Page 3 of the complaint, and likewise Subparagraph (e).

Mr. McKevitt: Sub (e) on page what?

Mr. Etter: 3. Subparagraphs (a) and (e), and Subparagraph (a) on Page 4 and Subparagraph (c) on Page 5.

Mr. McKevitt: What is on Page 4, what paragraph?

Mr. Etter: On 4 is Subparagraph (a), and Subparagraph (c) on Page 5.

The thought I have in mind, your Honor, is that the examination of this kind, I probably, I think, under [276] those allegations, I have a right to show that if a man is operating a train at the

(Testimony of Francis William Scobee.)

speed at which this man says he was operating it and doesn't have any idea, as he claims he doesn't, any idea of the control that he exercises over the train by stopping it, that he certainly is guilty of a reckless disregard and is guilty of negligence in the operation of the train at that speed.

The Court: Well, you have proven that, haven't you?

Mr. Etter: Beg your pardon?

The Court: According to your theory, you have proven that he didn't know how long it would take to stop it.

Mr. Etter: Except the one question I asked if he had any idea. I wanted to see if he had any idea of what distance he could stop the train going at that speed. If he says he has no idea, I think I have conclusively proved he was guilty of negligence.

If you remember, your Honor sustained the objection to that question.

The Court: You have a right to interrogate as to what he did and what happened and what happened to the train as it approached this crossing, but when you get into the realm of hypotheses here as to how far it takes to stop a train weighing a certain amount, this particular train, I don't think you can require a witness, who doesn't think [277] he is qualified and doesn't appear to be qualified, to require him to testify as an expert.

Mr. Etter: No, I meant to change the question, though. not go into any hypothesis, and ask

(Testimony of Francis William Scobee.)

him if he had any idea of how soon or how quickly he could stop that train going at the speed he was and have him answer without regard to weight or anything else, to show that if he was operating at 60 miles an hour and didn't have any idea of how soon he could stop it, he was certainly guilty of reckless disregard going that speed without ever knowing how he was going to stop the train or when.

Mr. McKevitt: You are not arguing the admissibility of evidence now, then. As I understand it, what he is trying to deduce from that statement is that by virtue of this man's admissions that he doesn't know this, that and the other ergo prop hoc, the fellow must have been negligent in operating that train. If he wants to stand on that proposition, I will meet him on it any time.

Mr. Etter: Well, I am merely saying and I am suggesting to the Court what I am trying to prove by this witness. Now, in accord with my allegations, if he doesn't know how to stop his train or when he can stop it and he still runs it down the track 60 miles an hour, it is a question of fact for this jury to determine whether or not he operated it recklessly with an indifferent disregard of [278] people who were using these highways across the track.

Mr. McKevitt: Why don't you ask him what he did?

Mr. Etter: I am addressing my remarks to the Court and I am telling the Court what my purpose

(Testimony of Francis William Scobee.)

is. And I think the same as I would have in an automobile case, where there was a speed of that kind, I have a right to find out whether the driver had it under control, which is certainly negligence in the operation of a moving vehicle and would certainly be negligence in the operation of this train.

The Court: Well, I connected up your question with the matter of trying to get him to testify as to how many feet or approximately how many feet it would take to stop this train if he dynamited it.

I think you have a right to inquire as to what control he was exercising or what he knew about length of time it would take to stop or the distance it would take to stop it.

Mr. McKevitt: An emergency stop. Mr. Etter has been talking to this witness about the "feel" of a train, the "feel" of a train, the "feel" of a train. The witness says yes, but the witness is talking about a normal stop going into a station. He has testified, as I recall it, that this is the first time that he was ever met with an emergency wherein he was required to "big hole" or dynamite the train. Now, Mr. Etter is trying to force him [279] to testify, that under those conditions that existed that day, I assume, that he should tell the jury that he could have stopped that train within some distance. Now, if the witness says, "I don't know," that certainly ought to end that examination.

Mr. Etter: Well, if a man is operating a moving vehicle, he is going 60 miles an hour, he testifies

(Testimony of Francis William Scobee.)

that he hasn't got any idea of when he could stop that, I say that is a reckless and wanton negligence. I haven't any right to operate an automobile down the street at such a speed that I haven't got any idea where I can stop it.

Mr. McKevitt: Have you alleged in this complaint that this man was an incompetent engineer?

Mr. Etter: Don't have to allege he is incompetent.

The Court: Well, I think that is rather far-fetched. They don't have to take every engineer out and have them dynamite trains at every crossing in order that they will know exactly what the reaction will be and how long it will take them to stop them. Nor do I think you could prove a case against a driver of an automobile if you proved he was going 50 miles an hour, within the speed limit, and then get him on here and ask him, "How long would it take you to stop your car if you jammed all the brakes on?" I don't know, I am negligent every time I drive a car, if that is the case, because I don't know how many feet it [280] would take if I pulled the emergency and put the foot brake on to stop my car, and, yet, I have a right, I think, to drive my car around over the highways.

Mr. McKevitt: May I make this further observation in connection with calling your Honor's attention to the case of Dean vs. Northern Pacific, Mr. Williams on the other side?

Now, what Mr. Williams did, and what he is trying to establish here, and he is going to be

(Testimony of Francis William Scobee.)

driven to it, is this last clear chance doctrine. Now, your Honor will recall that in that Dean case, the plaintiff's attorneys in advance had taken the deposition of the engineer, and they had ascertained the weight of every unit, the type of brakes, the grade of the track, and so on, and so on, and then they called an independent third party as an expert and, based upon those facts, they presented a hypothetical question to him. Now, that is what Mr. Etter should do here, but he is trying to make this fellow an expert against himself. He sued this man for \$35,000 and his chestnuts come out of the fire, and now he is trying to make this fellow a witness against himself.

The Court: That is beside the point, but bring in the jury, we will proceed, then.

(Whereupon, the following proceedings were had in the presence of the jury.) [281]

Q. (By Mr. Etter): Mr. Scobee, as I gather it, you remember it by seeing the whistle post, your train had reached a speed of 60 miles an hour; is that correct?

A. It was about that speed, yes.

Q. All right. Will you tell us what happened after that?

A. Well, after glancing at the speedometer and approaching this whistle post, the whistle post is a sign that you are approaching a crossing and prepare to start blowing your whistle for this crossing.

Q. All right.

A. And I had reached for the whistle and

(Testimony of Francis William Scobee.)

started my procedure of blowing the whistle for this crossing.

Q. All right?

A. I had blowed one long whistle, and then there is a pause, and blowed another long whistle, and then this truck——

Q. Where were you? Where were you when you blew one long whistle?

A. One long, and then a pause, and then another long one.

Mr. McKevitt: And another long?

A. Another long.

Q. (By Mr. Etter): A long whistle, what do you mean by a "long" whistle, would you tell us?

A. Well, at grade crossing, on your road crossings over railroad track, we have two long and a short and a long whistles we blow for those crossings for a warning.

Q. The first one you blew was the long one?

A. The long whistle.

Q. All right, how many seconds is a long whistle?

A. Well, I couldn't point that out, how much time I took to blow that whistle.

Q. Well, would it be two seconds?

A. Oh, we'll say a second.

Mr. McKevitt: Is that the first long whistle?

A. First whistle.

Q. (By Mr. Etter): You say the second is a long whistle?

(Testimony of Francis William Scobee.)

A. I can't pin point it to seconds, I don't watch how long it takes me to blow this whistle.

Q. Well, I am going to make a noise for a second and ask you if that is a long whistle, just so we can try and get it straight. "Toot," is that a long whistle? A. No, that is a short.

Q. All right, what would a long whistle be, then, in seconds?

A. Well, your long whistle would run probably two seconds or a little better.

Q. Two seconds or a little better? A. Yes.

Q. So you gave a long whistle, is that right?

A. Yes.

Q. And then a pause? A. Then a pause.

Q. How long a pause?

A. I couldn't tell you.

Q. Well, would it be one second or two seconds?

A. Well, there was a pause in there, but I couldn't tell how long it was.

Q. It would be one second, at least, wouldn't it?

A. It would be more than one second, yes.

Q. Well, make it brief, would it be two seconds?

A. Around that neighborhood, I couldn't pin point it.

Q. Then you gave another long whistle?

A. Another long.

Q. Beg your pardon?

A. Another long whistle, yes.

Q. All right. And then what happened?

A. Then this truck showed up.

Q. When, right after the second long whistle?

(Testimony of Francis William Scobee.)

A. Yes, after I had ceased blowing the second whistle.

Q. I see. All right, when did you first see the truck?

A. Oh, I would say it was about 25 feet from the crossing.

Q. About 25 feet from the crossing. What direction? [284]

A. It was coming from the south to the north.

Q. Beg your pardon?

A. Coming from the south to the north.

Q. Coming from the south to the north. And where was your train when you saw that truck?

A. Oh, I would say, just guessing, I never measured no distance, but I would figure it was about, oh, 2 or 300 feet east of the viaduct, that Milwaukee viaduct.

Q. 2 or 300 feet east? A. Yes.

Q. Of the Milwaukee viaduct?

A. May have been a little more, I don't know.

Q. All right, and this whistle tooting you started, as I gather it, you started it as you came to the whistle post; isn't that right?

A. Yes, at the whistle post or shortly after the whistle post.

Q. Shortly——

A. I had arrived at the whistle post.

Q. You had arrived at the whistle post, and that is when you started whistling? A. Yes.

Q. In other words, you had arrived at the whistle post and tooted a long, and then you had a

(Testimony of Francis William Scobee.)

pause, and then you tooted another long, as I understand it, and after you [285] had blown your second long whistle, you were 2 or 300 or more feet east of the Milwaukee overpass?

A. I could have been, I didn't pin point it down to feet, I just—I knew I was east of the viaduct when the truck approached.

Q. How far were you east of the viaduct?

A. Well, I couldn't pin point that down, I don't know.

Q. You don't know in feet?

A. Not in feet, no.

Q. All right. And you saw the truck about 25 feet away?

A. It just came out in the clear and I figure about 25 feet from the crossing.

Q. How do you mean it just came out in the clear?

A. Well, it comes out behind that Milwaukee viaduct there, that overhead.

Q. Beg your pardon?

A. It comes out in the clear from that Milwaukee viaduct, cement pillars there.

Q. Is it your testimony that it comes out in the clear here (indicating)?

A. No, the Milwaukee viaduct has cement pillars on each side of our track.

Q. That's right, right here (indicating).

Mr. McKevitt: No, he is referring to the Milwaukee viaduct here, Mr. Etter (indicating). [286]

(Testimony of Francis William Scobee.)

Mr. Etter: I would like to conduct this examination, Mr. McKevitt.

Mr. McKevitt: Yes, you are pointing to the wrong viaduct.

The Court: I think you should let counsel conduct the examination.

Mr. McKevitt: I'm sorry.

Q. (By Mr. Etter): Would you come down and point out which one you have reference to?

A. Yes, sir.

(Witness goes to map.)

This is the east here (indicating) and the truck was coming up here. I would say when I first got a view of it it would be about 25 feet from the crossing here.

Q. About 25 feet? A. Yes.

Q. From the crossing?

A. I could see from back here east of this viaduct, I could see across here to this cement pillar and just see the truck approaching about 25 feet.

Q. About 25 feet, all right.

A. But how close I was in feet, I couldn't tell you.

Q. But you were the other side——

A. I was east of it, yes. [287]

Q. You were east of it, all right. You were not able to see it before that time?

A. No, it didn't come into view until that time.

Q. You didn't see it until that time?

A. No.

(Testimony of Francis William Scobee.)

Q. All right. Now, will you tell us then what happened?

A. Well, I made an application of the brakes. The truck came out in this kind of a blind area here (indicating). This Milwaukee viaduct, I made—I couldn't tell you how much of an air application I made, but I made an application of the brakes and felt the train take ahold, and then the truck momentarily stopped at the crossing.

Q. Stopped at the crossing?

A. Just momentarily stopped clear of the crossing.

Mr. McKevitt: Clear of the crossing?

A. Clear.

Q. (By Mr. Etter): You mean clear——

A. Of the road crossing over the track.

Q. Clear of the crossing on the south side of the crossing? A. That's right.

Q. How close was it to the crossing?

A. It was clear——

Q. Beg your pardon? [288]

A. Oh, it must have been 10 feet, anyhow, because it was clear of the track.

Q. It was clear. All right, and then what happened? A. I released the air.

Q. Beg your pardon?

A. I released the air that I had set on the train.

Q. You released the air. All right, then, and will you tell us what happened?

A. Then all at once the truck started bucking up onto the track.

(Testimony of Francis William Scobee.)

Q. All right, where were you when it started bucking? Where was your train?

A. I was coming under the viaduct at that time approaching the crossing. Oh, I would say——

Q. Coming into the viaduct, under the viaduct?

A. I would say about, oh, 600 feet from the crossing at this time.

Q. About 600 feet. When it started bucking, then what happened?

A. That is about—now, I don't know just exactly the measurements on that, but I was coming under the viaduct then when this happened.

Q. When it started to buck? A. Yes.

Q. That is, about 10 feet south of that crossing?

A. It was just clear of the crossing before it started bucking at——

Mr. McKevitt: Keep your voice up. I didn't hear that last part of the question and answer at all.

A. I had just released the air and then the truck started bucking up on the track just as I was coming under the viaduct.

Q. (By Mr. Etter): Just as you were coming under the viaduct? A. Yes.

Q. All right. So we have it now, as you hit the whistle post, you gave a long, a pause, and another long, and about that time you were still some 100 feet or 200 feet, as I gather it, or whatever distance you were, east of the viaduct?

A. I was east of the viaduct; how many feet it was, I don't know.

(Testimony of Francis William Scobee.)

Q. Well, have you got any idea of length as to your train, as to your Diesel? Could you spot it?

A. Well, that is two years ago and all I know is I was east of it.

Q. Well, you have been talking with Mr. McKevitt about this case before you testified here, haven't you? A. Yes, I have.

Q. At considerable length? [290] A. Yes.

Q. All right. Did you tell him everything that you remember?

A. I told him everything that I remember.

Q. I see. Showing you here the Defendant's 28, Exhibit 28, could you tell me, looking at that, whether that is about the distance you were when you saw the automobile?

A. Yes. It could have been that far.

Mr. McKevitt: Now, where——

Mr. Etter: Now, just a moment, counsel.

Mr. McKevitt: I want to see the exhibit.

Mr. Etter: Just a moment, now.

Mr. McKevitt: I want to see the exhibit.

Mr. Etter: All right.

Q. Would you say that was it, or were you closer?

A. That is a close proximity, because you can see right here, you can see the top of the truck coming out from this point over here (indicating).

Q. Were you closer than that, do you think?

A. Well, I could have been, but I can't tell you, see, pin pointing it down in feet. I can't tell you just how close it was.

(Testimony of Francis William Scobee.)

Q. Well, looking at Exhibit No. 27, do you think you were that close? [291]

A. Well, there isn't—it is a little closer, but it is pretty hard to tell.

Q. Well, could you tack it down to say it was some place between this picture and the one I just showed you, 27 and 28?

A. I couldn't say. All I know is that I was east of the viaduct and I just caught a glimpse of the truck, the top of the truck, coming up to the crossing, about 25 feet from the crossing.

Q. Would you say, though, in your opinion, it could be either this one or the other one?

A. It is a close facsimile, but I couldn't tell you how——

Q. Of where you were? A. Huh?

Q. Of where you were when you saw the truck?

A. Yes, but I couldn't tell you in feet.

Q. Handing you now 26, you saw it before you reached that point, didn't you? A. Yes.

Q. Huh? A. Yes.

Q. Now, if I am mistaken, did you testify that this bucking that you saw happened as you came out through the viaduct or just before you got into it?

A. I was about under the viaduct. I can't tell you just [292] exactly because everything was pin pointed on this truck approaching. A fireman and engineer, when he has cars, trucks and what have you, approaching crossings like that, your attention is all diverted to that one particular object,

(Testimony of Francis William Scobee.)

and to tell you just exactly—I knew I was coming close under the viaduct.

Q. You were coming close under the viaduct?

A. And this emergency came up, and my fireman, he jumped up and started blowing the whistle after I had to leave the whistle and go for the air.

Q. All right, when did you start? The car was bucking, but it wasn't on the tracks, is that the idea?

A. It hadn't got up to the track right now when it started bucking, but it bucked its way up onto the track.

Q. All right, where was the train situated from the crossing, from the car? You were pin pointed on the car, weren't you?

A. I had my eyes pin pointed on the car, yes.

Q. How far away were you from it when the car got on the crossing.

A. Around the viaduct.

Q. Beg your pardon?

A. I was around the viaduct with my engine.

Q. When the car got right on the crossing?

A. Well, I was going under the viaduct about that time, right around the viaduct. [293]

Q. In other words, if I understand your testimony correct, you were going right under the viaduct, you were right about at the viaduct, when the car bucked right onto the track at the crossing?

A. Right about that point.

Q. Right about that point?

(Testimony of Francis William Scobee.)

A. Close to it.

Q. Calling your attention to the Defendant's Exhibit No. 26, talking about that point, would it have been west, just west on the west pier, or would it be right there (indicating), do you think, when you saw the car buck right up onto the crossing?

A. I couldn't tell positively, because my attention was diverted mostly to the truck. I couldn't tell you, pin point down the footage there, just how close I was to the truck.

Q. No, but all I am trying to ask you, do you think you were out the other side of it or on this side of the viaduct? You knew you were at the viaduct.

A. I was at the viaduct, but to tell you just how far, I couldn't tell you.

Q. All right.

A. Because my attraction was on this car.

Q. Would it be fair, then, to both of us to say you were [294] right about the middle of the viaduct? A. Well, close to it.

Q. All right. And that is when the car bucked out to the track?

A. It bucked its way onto the track, yes.

Q. All right. So then you were right under the viaduct, what did you do when the car bucked right out on the track?

A. Well, I had already released the air when I saw the truck approach.

Q. Beg your pardon?

A. When I saw the car approach the crossing,

(Testimony of Francis William Scobee.)

it come out from behind this pier up to the crossing, and I had a feeling that they might try to go across so I set some air, how much I don't know. But I had set an amount of air and it was just one of those things of slowing down in case, and when it bucked, when it come up to the crossing, it momentarily stopped. Well, that was a relief to me, I released the air.

Q. All right.

A. Well, the next thing that come up, the truck started bucking its way up there on the track.

Q. All right, the air was released at the time the car bucked up on the track and you were under the viaduct? A. That's right. [295]

Q. In other words, you had no air on when you were under the viaduct, but the car then bucked up to the track and you had just released the air?

A. I had released the air.

Q. All right, what did you do when you saw it go right up on the track?

A. That is when I had to go into emergency.

Mr. McKevitt: You what?

A. I had to take and put the train into emergency when the truck went on the track.

Q. (By Mr. Etter): You put it in emergency?

A. Yes.

Q. All right. What did you do? Tell us now just exactly what you did.

A. What I did was have to sit there, because that is all I could do was put the train in emer-

(Testimony of Francis William Scobee.)

gency. That dumped all my reservoirs into the train line.

Q. No, but tell me just what you did. I want you to tell whether you pulled the throttle all the way back.

A. Well, I had ahold of the whistle.

Q. All right.

A. And then when I went to set this amount of air to make a slow down, I let go of the whistle, and this fireman of mine had fortitude enough to jump up and grab the whistle himself in a standing position, and I was [296] setting the air with my right hand and starting to shut the throttle down with my left hand when she momentarily paused at the crossing. When she momentarily made that pause, I reached up with my right hand and set the air back in a normal position on the brake valve.

Q. The thing I am trying to get at now, when you were under the overpass, when you were under the overpass, that is when the girl's car got out on the crossing, is it not? A. That's right.

Q. When you were under the overpass?

A. I was just going under the overpass or right around that area.

Q. That's right, and that car was out on the crossing in front of you directly astraddle the crossing? A. Just about there, yes.

Q. Isn't that right? And that is when you put on the emergency application?

A. That's right.

(Testimony of Francis William Scobee.)

Q. And in doing that, did you pull the throttle or push the throttle all the way back off?

A. I had to shut it all the way.

Q. Did you take the air and pull it all the way out? A. That's right.

Q. That would be just under the viaduct? [297]

A. It could be just a few feet beyond the viaduct.

Q. That is what I mean.

A. I can't pin point right down, because them things, you don't see those things. Those emergencies come up and you can't pin point nothing down like that.

Q. That's correct.

A. All I did was went into emergency.

Q. Went into emergency, but I say you pushed the throttle all the way off and pulled the air all the way on, either at the viaduct or 50 feet beyond it toward——

A. It is around that area somewhere.

Q. All right, you gave it full emergency?

A. That's right.

Q. All right. Then tell us what happened.

A. We hit the truck, moved on up the track until the train stopped, I figure about, oh, 1,500 feet, something like that.

Q. Well, now, how far, after your train stopped, how far was the rear end of your train from that crossing?

Mr. McKevitt: If you know.

Mr. Etter: If you know.

(Testimony of Francis William Scobee.)

A. I really don't know. We just took a walk up that way to the front end where the truck was still draped on the front end of our engine, where the impact was, and we figured about 1,600 feet at that time. [298]

Q. To the crossing, back to the crossing?

A. To the crossing, yes.

Mr. McKevitt: From the pilot?

A. From the pilot where the truck was still on the pilot. But as far as the rear end of the train goes, I didn't measure that distance there. I just walked it off.

Q. (By Mr. Etter): If your train was 700 feet long, giving it an extra car and the longest lengths that you gave me, if your train was 700 feet long and you paced 1,600 feet back, it was approximately 900 feet from the crossing, the rear end of your train, wasn't it?

A. Approximately, if it was that far.

Q. Yes. And you had applied your emergency just under the viaduct or possibly 30 or 50 feet beyond it, isn't that right.

A. I don't know how much footage there was in there, but it was just around that place in there.

Q. So where you applied your full emergency, that is, just through the viaduct, where you applied your full emergency, you went the distance from where you applied your emergency down to the crossing, hit the car, and took the car on down 1,600 feet on the front of your locomotive?

(Testimony of Francis William Scobee.)

A. I can't tell just how close I was. I knew I was around the viaduct when I dynamited my train, but I couldn't tell you how—— [299]

Q. That is what I mean.

Mr. McKevitt: Let him finish his answer.

Q. (By Mr. Etter): I am saying you were in the area of the viaduct, you were under it or you were 50 feet beyond or maybe you were 75, but you were right close under the viaduct, I am going with you on that; is that right?

A. Well, sir, I can't pin point a certain amount of feet when an emergency comes up. You don't look at the terrain around you and tell just exactly where you was at. An emergency come up, my eyes are pinned on this trouble, this automobile in front of me on the track. I can't pin point a certain amount of feet and distance.

Q. I'm not asking you to, I'm merely asking if you weren't in that area right by the viaduct or close thereto?

A. It was close to, but I couldn't tell you in amount of feet.

Q. That's right, and then you paced off from the front end of your train back to the grade crossing, it was 1,600 feet?

A. We just walked it off and I just figured about how much.

Q. Figured about how much?

A. That is from the crossing to the front end of my engine where the truck was. [300]

Q. Taking your figure of 1,600 feet and going

(Testimony of Francis William Scobee.)

back up to that general area near the viaduct somewhere where you pulled on your full emergency, the total number of feet that you traveled in that train after you put it on full emergency——

Mr. McKevitt: That is objected to as being argumentative. The witness can tell distances, and so on, and his best opinion.

The Court: Let's have the question.

(The question was read.)

The Court: He may answer that question.

A. Well, in that question, I don't know where exactly, how many feet east of the crossing I put it in emergency, so I couldn't truthfully add up the amount of distance I had traveled after I went in emergency.

Q. (By Mr. Etter): After you put it in emergency, did you keep your eyes glued on the car?

A. Had to, that is the main attraction there.

Q. All right, what did you see, if anything?

A. Well, just as the car went—the truck went out of sight from me in front of the Diesel—of course, I am in a sitting position and I can see down a ways—I saw the head come out of the car door, and that is the last I saw when we hit. [301]

Q. What was that again, now?

A. I saw a head come out of the door, doorway, on the left-hand side.

Q. A head come out of the door?

A. Yes.

Q. At what point was that?

A. I couldn't tell you how close I was. I was in

(Testimony of Francis William Scobee.)

a sitting position just before the truck went out of sight from me in front of the engine. That is the last I saw, was this head coming out, open the door, and this head coming out.

Q. It would only be six or eight feet, isn't that right?

A. Well, I couldn't pin point that, either, because, see, sir, you are sitting up high.

Q. I know it.

A. You are sitting up high and in a sitting position, like I am now. Sitting up high, you couldn't tell whether you raised yourself up at the same time or you lowered yourself when you are going to hit an object sitting in front of a glass like I am on a Diesel. I might have even ducked for flying parts or something like that, I couldn't tell you, but the last thing I remember before we hit was this head coming out of this car door.

Q. You didn't duck, though? [302]

A. Yes, I ducked, just as we hit.

Q. Just as you hit? A. Yes.

Q. Well, now, you have sat in that Diesel since, isn't that right? A. Quite a few times.

Mr. McKevitt: I didn't get the question?

(The question was read.)

Q. (By Mr. Etter): Isn't it a fact that you can look down from that Diesel and see anything that is 15 feet in front of you?

A. Oh, if you raise up, yes, sometimes.

Q. No, but I mean in a natural sitting position, isn't it a fact that you can see anything that is 15 feet in front of the Diesel?

(Testimony of Francis William Scobee.)

A. If you are looking right straight over the nose?

Q. If you look over the nose, yes?

A. In front footage, I never measured it off or anything, but it is fairly close.

Q. And, in other words, just before you hit, you saw this head come out of the window or out of the door?

A. I saw the door open and the head come out.

Q. And the head come out?

A. And that is the last I saw before the truck and everything went out of sight from me in front of the Diesel. [303]

Q. Right after the accident happened, Mr. Scobee, what did you do?

A. After the accident happened?

Q. Yes?

A. Well, the fireman and I both climbed off the engine and, of course, there was a strong smell of gas——

Q. Yes?

A. And being a truck and a panel truck, the first thing we thought, there might be more people in it in the back end of the truck, that is, so we took the fire extinguisher down with us and sprayed on the motor so in case a fire would start. And we walked out away from the engine and looked back and there was a fellow standing on the crossing and he had pretty near the same clothes on as this shirt the fireman was talking about he had seen, because the fireman was in a standing position, he

(Testimony of Francis William Scobee.)

got to see this shirt that she had had on. It was—I don't know—a man's shirt, checkered shirt of some kind, and we thought they had escaped out of the wreck.

Q. I see. Then what did you do?

A. We walked back then to see if anybody was hurt, and, of course, we found these lady's shoes at the crossing and then we started to realize that it must have been a girl that was hurt. So then we walked up the track, [304] oh, we figured about 75 feet up the track and about 10 feet off the outside rail, then we found the girl.

Q. All right.

Mr. McKevitt: This is west of the crossing?

A. That is west of the crossing, yes.

Q. (By Mr. Etter): All right, and then will you tell us, did you talk to anybody there at the time?

A. Well, there was—I don't know, the coroner and then there was state police, they called some more in, and I guess it was a city coroner or the county coroner of Kittitas County, and Mr. Dorsey, I think he is the County Sheriff.

Mr. McKevitt: Keep your voice up.

A. Mr. Dorsey, the County Sheriff.

Mr. McKevitt: Oh, yes.

A. Of Kittitas County, I believe. And I don't know who the other fellows was. There was quite a few of them asking questions.

Q. (By Mr. Etter): Did you talk with Sgt. Carriger of the State Patrol?

(Testimony of Francis William Scobee.)

A. I don't know their names.

Q. Beg your pardon?

A. I didn't know their names. There was a couple of state police there.

Q. Did you talk with them? [305]

A. I didn't know his name.

Q. Beg your pardon?

A. I didn't know his name.

Q. No, but did you talk with him?

A. Yes, they was asking me lots of questions.

Q. All right. What did you tell the Sergeant?

A. I couldn't tell you.

Q. Beg your pardon?

A. I couldn't tell you, at that time.

Q. Do you remember that you told Sgt. Carriger that you saw the truck or that you put on your application, put on your emergency brakes, about 100 feet from the crossing?

A. I couldn't remember that.

Q. Do you remember that you told him that?

A. No.

Mr. McKevitt: Well, now, I object to the way this question is put. If it is for the purpose of impeachment, I think he ought to ask him if he told that, instead of counsel saying, "Don't you remember you told him that?" It is a bald assumption that he did and I object to the form of the question.

Q. (By Mr. Etter): Well, all right, did you tell him that?

A. I don't know. I don't think, I don't remember. That is two years ago. [306]

(Testimony of Francis William Scobee.)

Q. What did you tell him?

A. I don't know. I don't know whether I even talked to him or not. I know I talked to the state patrolmen. There was two or three of them around. Traffic was thick on the highway and they had to call out some patrolmen from the city to come down there and help get that traffic on the highway moving, and there was a lot of people milling around there and I was talking to them and they was asking me questions and I was answering. I don't know what I said.

Q. Did you tell the Sergeant that as you slipped through the viaduct, you saw a light truck stalled on the crossing with a girl in it, apparently trying to restart the truck?

A. I don't remember of ever saying anything like that.

Q. Beg your pardon?

A. I don't remember ever saying anything like that.

Q. You don't remember saying it?

A. No.

Q. I see. Did you tell the Sergeant at that time, that as you approached the overpass, that you saw the car 25 feet south of it?

A. I don't remember.

Mr. McKevitt: I object to this unless he identifies to the witness, if your Honor pleases, who this Sergeant is, [307] and there might have been three or four sergeants there.

The Court: I think first we should have the per-

(**Testimony of Francis William Scobee.**)

son he claimed he talked to and the time and place.

Q. (By Mr. Etter): All right, immediately after the accident, did you talk to a state patrolman?

A. Yes, I talked to some patrolmen, but I don't know who they were.

Q. You don't know who they were. Did they tell you who they were? A. I don't remember.

Q. Sergeants Carriger and Stanley?

A. I don't remember.

Q. They were two state patrolmen.

A. There was two or three of them around there. There was a lot of traffic and everything, they had to call out some more.

Q. And did you talk with those two patrolmen, state patrolmen, after that accident when they came out?

A. There was patrolmen there, yes, and I was talking to them, but what I said, I don't remember.

Q. I will ask you, did you say to these two state patrolmen that you applied the brakes 100 feet from the crossing? A. I don't remember.

Q. Did you tell the state patrolmen that when you saw the car, you slowed the train down but you did not attempt [308] to dynamite the brakes?

A. No, sir.

Q. Beg your pardon?

A. I don't remember telling anybody anything like that.

Q. Did you tell Mr. W. R. Cole?

A. I don't remember anything like that.

(Testimony of Francis William Scobee.)

Q. Do you know the Sheriff of Kittitas County?

A. No.

Q. Did you tell the state patrolmen that you saw the girl trying to push the car off the crossing?

A. No, sir.

Q. Did you tell anybody that?

A. No, sir.

Q. Did you tell the state patrolmen, these two state patrolmen, that you saw the girl or saw the truck when the girl was about 25 feet from the crossing?

A. No, I don't remember what I told them.

Q. Do you remember whether you told them that or not? A. I don't remember.

Q. All right. Did you tell the two state patrolmen that as you came through the viaduct, the car you saw started to jerk, it started jerking before it went on the crossing?

A. I might have, I don't remember.

Q. Do you remember whether you did or whether you did not? [309]

A. I don't remember.

Q. I see. Did you tell them that you saw the girl in the car trying to start it?

A. I don't remember that, either.

Q. You don't?

A. I don't remember the conversation with them fellows. That is two years ago.

Q. Well, isn't it a fact that the first time that you told anybody about the car jerking when it approached the crossing and that you saw it 25 feet

(Testimony of Francis William Scobee.)

from the crossing, is right here in this courtroom?

A. I have told Mr. Etter about it — I mean Mr.——

Mr. McKevitt: McKevitt.

A. McKevitt and Mr. Thomas.

Q. (By Mr. Etter): When did you tell them about it?

A. That was here Sunday night or Sunday morning.

Q. Sunday morning? A. Yes.

Q. All right.

A. First time I seen them.

Q. All right, up until Sunday morning or Saturday night when you talked to Mr. Thomas and Mr. McKevitt, had you ever told anybody the same story you have told here about your seeing the car 25 feet from the crossing and then seeing it jerk up on the crossing? Have [310] you ever told that to anybody?

A. Well, the claim agent, I suppose.

Q. When?

A. Well, right after—no, I don't—I don't remember that part of it there. That is something that I can't pin point down just where I first told anybody about it. If it was at the scene, I can't remember what I talked with them fellows about, but I know in my own mind just what happened.

Q. You never told any investigating officer that, did you, now?

A. Well, I couldn't tell you just exactly what I told them fellows at the scene two years ago.

(Testimony of Francis William Scobee.)

Q. But I am asking you this, you did not tell them that? A. I might have.

Q. Huh?

A. I might have. But I can't pin point it down, because I don't know who they was and I don't know just what I said because that was two years ago and I can't remember what I said then.

Q. Did you see the occupant of the car other than her head coming out of the door?

A. Just got the image through the glass as it was bucking up onto the track.

Q. I see. [311]

A. And then the head coming out of the car door. As far as the other features, I don't know.

Q. Did you see a checkered shirt on the girl?

A. In the car window, as it was bucking up on the track, just got an image of the shirt that she was wearing. What color it was, I couldn't tell you. I knew it was a checkered shirt.

Q. You knew that it was checkered?

A. Yes.

Q. When did you see that checkered shirt?

Q. Just as the truck was bucking up on the track.

Q. Beg your pardon?

A. I had my eyes pin pointed on the person and the truck as it was bucking up on the track, and I could tell it was a checkered shirt and I didn't know whether it was a man or woman in the truck.

Q. I see. And you were able to see that from your

(Testimony of Francis William Scobee.)

position somewhere near the viaduct when you put on the full emergency?

A. Just around that area.

Q. Just around that area?

A. I couldn't tell you how far it was away.

Q. I am handing you the Defendant's Exhibit No. 23, which is a picture, you know, the inscription here, 400 feet east of the crossing facing westward.

A. Uh-huh.

Q. Do you see that crossing?

Mr. McKevitt: What is the number, Max, 20 what?

Mr. Etter: 23.

Q. You see the crossing down here (indicating)?

A. Uh-huh.

Q. And, of course, this picture was taken approximately 150 feet, more or less, west of the viaduct. Were you at that point, approximately, do you think, when you saw the checkered shirt on the girl in the car up here?

A. It could be near there.

Q. It could be near there?

A. Right around that point, yes. I couldn't pin point it down, no.

Q. Right around that point. Have you any idea of the speed of your train just after the collision with this car at the crossing?

A. Only afterwards.

Q. Only afterwards? A. Yes.

Q. How soon afterwards?

A. Well, I had reached that speed of about 60

(Testimony of Francis William Scobee.)

miles an hour before I started blowing the whistle, and there I couldn't tell you what the speed was until the tape on the engine was checked. [313]

Q. Where was that, after the accident?

A. Seattle, Washington.

Q. No, but what I want to know is did you check your speed shortly after you hit the car at the crossing? A. No.

Q. Do you know what speed you were traveling?

A. No, I don't.

Q. Beg your pardon?

A. Only when I checked the tape, is all. They checked the tape in Seattle when I arrived.

Q. They checked the tape?

A. Our speed recorders have teletypes on them.

Q. Yes.

A. And they show each mile, each inch, pretty near, of your track, and this is registered on a tape along with the speedometer and it shows your various speeds. And the only way I could tell was when I arrived in Seattle, and we don't have no way of getting into them, they are padlocked or locked.

Mr. McKevitt: It is what?

A. These tapes, recorders, are locked and we have no way of getting into them. There is only one man at the station, at the roundhouse, and he takes the tapes out and that is the first—

Q. (By Mr. Etter): You don't know, then, independently, [314] what your speed was?

(Testimony of Francis William Scobee.)

A. Independently, I don't know what speed I was going at.

Mr. Etter: That is all.

Mr. McKevitt: No questions.

The Court: That is all, then.

The Witness: Is that all with me?

The Court: Yes.

Mr. McKevitt: Wait a moment, I think Mr. Etter has something else.

Mr. Etter: Just one or two questions.

The Court: Oh.

Q. (By Mr. Etter): Do you know Mr. Pontice?

A. Mr. who?

Q. Mr. Pontice from Ellensburg?

A. I have seen him a lot of times, I just met him.

Q. Beg pardon?

A. I just met him.

Q. When did you meet him?

A. Here at this courtroom.

Q. You have never seen him before?

A. Oh, I have seen him, yes.

Q. When?

A. Oh, going by on the train. He used to work at Ellensburg.

Q. He used to work in Ellensburg? [315]

A. Yes.

Q. Have you ever talked to him before you have seen him in the courtroom?

A. Well, casually, I might have talked if he

(Testimony of Francis William Scobee.)

was stopped at the siding. As far as knowing him by name, I didn't know him.

Q. But you have talked to him?

A. Yes.

Q. A number of times?

A. Oh, maybe a few times.

Q. Have you ever talked to him about this accident?

A. No.

Q. Did he ever talk to you about it?

A. No.

Q. Never discussed it?

A. The only time I just met him here at this trial.

Mr. Etter: All right, that is all.

Mr. McKevitt: That is all.

(Witness excused.)

Mr. Connelly: Call John O'Neill, please. [316]

JOHN J. O'NEILL

called and sworn as a witness on behalf of the plaintiff, was examined and testified as follows:

Direct Examination

Q. (By Mr. Connelly): Will you give us your full name, please, Mr. O'Neill?

A. John J. O'Neill, John Joseph O'Neill.

Q. John Joseph O'Neill?

A. Yes.

Q. Where do you live, sir?

A. Ellensburg, Route 1.

Q. And is that somewhat outside the city proper?

A. About a mile and a quarter out.

Q. Are you a married man, Mr. O'Neill?

(Testimony of John J. O'Neill.)

A. Yes.

Q. Do you have a family?

A. Yes, sir.

Q. How many children do you have?

A. Four.

Mr. McKevitt: How many?

A. Three boys and one girl.

Q. (By Mr. Connelly): Are they all living at home with you?

A. Not now, there is two. [317]

Q. Who are the two that remain?

A. Larry and Mick.

Q. Larry and Mick? A. Yes.

Q. Which of those two boys is the older?

A. Larry.

Q. How old a boy is Larry? A. 16.

Q. About how long have you lived around Ellensburg, Mr. O'Neill? A. 45 years.

Q. You and your father before you, apparently?

A. Yes, sir.

Q. Do you have some brothers who live in the same general area that you live?

A. Yes, sir, two of them.

Q. What are their names?

A. Leo and Arthur.

Q. Where does Arthur live?

A. Well, he is about a mile, about two miles west of me.

Q. Two miles west of you? A. Yes.

Q. Where does Leo live?

(Testimony of John J. O'Neill.)

A. Well, he lives right by this crossing, right along the railroad, the highway. [318]

Q. Does Leo live at the old home place?

A. That's right.

Q. Have you had occasion to take a look at this map or sketch that has been put up here, Mr. O'Neill? A. I did this morning, yes.

Q. And does Leo O'Neill's house appear on that sketch or the old family place? A. Yes.

Q. I don't know whether it is necessary for you to come all the way down to this, but if you can see what I am pointing at is this square here indicates Leo O'Neill's home.

A. That is close.

Q. That is pretty close?

A. Pretty close.

Q. And this is generally the road running, according to the map, east and west on the section line? A. Yes, that's right.

Mr. McKevitt: Keep your voice up, John, please, so we can hear you.

Q. (By Mr. Connelly): And down here is what they call O'Neill crossing. (Indicating).

A. That's right.

Q. This is O'Neill Road.

A. That is O'Neill Road. [319]

Q. This is the O'Neill crossing.

A. That's right.

Q. Here the road turns and runs south 90 degrees down the other section line.

A. That's right.

No. 14795

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vs.
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Transcript of Record

In Two Volumes

VOLUME II.

(Pages 283 to 549, inclusive)

Appeal from the United States District Court for the Eastern
District of Washington, Northern Division

FILED

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PAUL P. O'BRIEN, CLERK



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(Testimony of John J. O'Neill.)

Q. Directing your recollection, Mr. O'Neill to the 8th of March, 1952, where were you the afternoon of that day?

A. Well, I was over home—I always call it home—my brother's place there.

Mr. McKevitt: Pardon me, would your Honor caution Mr. O'Neill about the acoustics? I just can't hear.

A. I was over at my brother's home and was helping him build a corral.

Q. (By Mr. Connelly): Over at Leo O'Neill's place we were just speaking about on that map?

A. That's right.

Q. Who all was there with you?

A. Well, my two boys and my brother Leo, Larry.

Q. Mick and Larry?

A. Larry and Leo.

Q. And that square, which is roughly on the south side of the road, represents the house, does it?

A. That's right.

Q. And are there outbuildings adjacent to it or on the other side of the road? [320]

A. Well, there is barns and corral is on the other side of the road.

Q. North?

A. It would be west from the house.

Q. West from the house?

A. Yes, it would be northwest of the house.

Q. Where were you fellows working?

A. Right over—well, across the road from the

(Testimony of John J. O'Neill.)

house over by the barn. That would be down, oh, I probably have to point it out to you.

Q. Why don't you come down, if you will, and put an "X" up on that paper and you can show us where you were working?

(Witness goes to Exhibit 1.)

A. Just approximately it would be—well, this is your railroad crossing, well, we were practically in line with it. The corral would be in here (indicating), they adjoin, this road is 60 feet, and then they have 100 feet right of way. Well, the corral of where the poles was where we was working was—one fence is right along the road here and we was right in here.

Q. That is a scale of one inch on the map is 20 feet on the ground. Without measuring it off, just give us an idea of where you were, where you fellows were standing. [321]

A. Well, we were probably——

Q. Make an "X" on the map.

A. I don't know, I just guess at along in here (indicating).

Q. Put your initials next to that.

A. (Witness complies.)

Q. All right, that is fine, thank you.

A. Maybe off a little way one way or the other.

Q. Well, give us a general idea and that is close enough, I think. That is about where you and Leo and the two boys were working on the corral?

A. Right at that time, when we had the poles

(Testimony of John J. O'Neill.)

there, and then we would carry them over to the corral there, right up in that vicinity.

Q. Do you recall about the time of day?

A. Well, it was in the afternoon. We had been there all afternoon.

Q. Do you recall the weather and the atmospheric conditions, the visibility, and so on? How about that?

A. It was a nice, clear day.

Q. Now, did something out of the ordinary occur as you and the other fellows were standing there working?

Q. Well, this accident happened there.

Q. Will you tell us what it was that first gave you notice that something out of the ordinary was happening? [322]

A. Well, I don't know what really caused it, we just heard the train and looked up and there was a car on the crossing and the train coming.

Q. All right, before we go on, you say "We heard the train." Did you hear a train tooting its whistle, or did you hear the rumble of a train?

A. Well, I heard the rumble of the train and then I looked up and there they were both there, the train and the car on the track, too.

Q. Did you at any time hear it tooting or the train whistling? A. Yes.

Q. And was this tooting that you heard after you heard the rumble and looked up?

A. That's right.

(Testimony of John J. O'Neill.)

Q. Where was the train when you first heard the rumble and looked up and saw it?

A. Just coming under the underpass.

Q. Just coming under this Milwaukee underpass that is indicated on the map? A. That's right.

Q. The concrete abutment business?

A. That's right.

Q. And where was the train when you first heard a whistle being blown? [323]

A. About midway, I would say or close, between there and the crossing.

Q. About midway?

A. Well, or approximately, I wouldn't say exactly.

Q. Well, giving us an idea, I will move the pencil along here, I think you can see that.

A. Yes.

Q. Here is the overpass of the Milwaukee, here is the O'Neill crossing, and you tell me about where the train was when you first heard the tooting.

A. Oh, well, about as long as—well, the engine and a car, I imagine, was about—the engine was all, it would be along in there (indicating).

Q. Right along in there?

A. Some place.

Q. All right, if I put an "X" on that, that is pretty close to where—

Mr. McKevitt: That map is drawn to scale, Mr. Connelly. I don't want an "X" to actually represent anything on this map, if your Honor pleases.

Mr. Connelly: I believe it is the best estimate, your Honor: that this fellow would have a right to

(Testimony of John J. O'Neill.)

come down and estimate on the map, scale or no scale.

The Court: I think the record may show on what basis it is put—will show, I mean. [324]

Mr. McKevitt: Well, the mark that is on the map isn't his testimony as to actual distance.

Mr. Connelly: It is an estimate, as I understand his testimony.

The Witness: I wouldn't say that exact.

Mr. Connelly: No.

The Witness: Where I marked for where we was standing isn't exact, it is in the vicinity, right close.

The Court: It is your best recollection?

A. That's right.

Mr. Connelly: Pardon me, your Honor.

The Court: He says it is his best recollection as to approximately where it was.

Mr. Connelly: I have labeled that "J. J. O'Neill" and I will mark it "Train" as your estimate as to where it was when you first heard the tooting of the whistle.

A. There was three toots along in there.

Q. Living where you do live and having lived where you have lived in the O'Neill house, I suppose I am correct in assuming that you heard the train go by there and heard it whistle probably hundreds of times? A. That's right.

Q. Now, when you first heard this train blowing its whistle about the place where the mark is on the map, was it an ordinary run-of-the-mill blowing

(Testimony of John J. O'Neill.)

of the whistle [325] or was it an extraordinary or frantic blowing of the whistle?

A. Well, it was just them three short toots.

Q. Three short toots? A. Yes. Sharp.

Q. When you first saw the train, and as I understand it, that was as it was just emerging from the Milwaukee underpass? A. That's right.

Q. Did your vision take in the approaching automobile driven by the Everett girl at the same time?

A. Well, when we—the way we was standing there, we just looked and seen the train and the car both.

Q. Now, was the car on the crossing at that time? A. That's right, yes.

Q. Did you see the girl at the time you saw the car? A. She was in it.

Q. She was inside the car at that time?

A. Yes.

Q. Could you tell what she was doing in the car at that time?

Q. Well, no, you couldn't tell what she was doing. You might imagine she was stalled or something, that it was stopped there.

Q. The car was completely stopped and stalled when you [326] first saw it? A. That's right.

Q. What happened then after you took this in with your eyes and saw this?

A. Well, she got out, shut the door, and just hesitated there, and then she took off.

Q. About how far was the train from her when she got out of the car and shut the door and——

(Testimony of John J. O'Neill.)

A. Well, that was happening so quick, I couldn't say. It was——

Q. When she had took off, in what manner did she take off?

A. Well, it would the car on the track and then she headed off—it would be a north, northern direction, northeast.

Q. North away from—— A. Yes.

Q. Away from the track toward the highway?

A. That's right.

Q. Was she running at that time?

A. Well, she was getting out of the way, she had time to take about three, four steps. That is the last I could see of what happened there. I figured she was about 10 feet from the car.

Q. You figure she was 10 feet from the car when the train [327 struck, is that it?

A. Huh?

Q. She was 10 feet from the car when the car was hit by the train?

A. Well, approximately that. She was running and you could see the space between her and the car.

Q. Did you think she had escaped when you saw all this? A. I thought she would make it.

Q. What did you do then after you saw the collision? A. Well, we run over there.

Q. All four of you fellows?

A. No, my brother Leo, and Larry started to come over and Leo told Larry to go to the house and call an ambulance, and Leo and I went over.

(Testimony of John J. O'Neill.)

Q. Did you see the girl laying on the road bed as you started over?

A. No, I didn't, not until I was over on the track when I first seen her or found her.

Q. Did you and your brother Leo go over and the boys went back to the house, is that it?

A. They went to the house.

Q. Larry and the younger brother?

A. Larry. I don't know whether Mick went to the house or not, but he never come over.

Q. Where did the train finally stop? [328]

A. Up the track.

Q. How far up the track, about?

A. Oh, I would say the back end of the train was, oh, 4 or 500 feet from the crossing.

Q. 4 or 500 feet?

A. Approximately that. I never went up to the train, but it was approximately that far.

Q. Do you recall how many cars, not counting engine pulling units, that made up the train?

A. No.

Q. Your figure of 4 or 500 feet—I think your figure is 4 or 500 feet as about the distance from the crossing to the back end of the train down the track? A. That's right.

Q. About how long would you say the train was?

A. Well, I would say the distance between the back of the train and the crossing was, oh, approximately, when we got over and then looking back at

(Testimony of John J. O'Neill.)

it, it would be about the distance, the same distance as the train, the length of the train.

Q. I see. A. The back end.

Q. How far down the right of way from the crossing toward the west was the girl's body?

A. Oh, I would say around 45, 50 feet. I never stepped it [329] off.

Q. No, don't misunderstand me, I'm not expecting you to give it directly to the foot. It is just as we all see these things and approximate, is all, Mr. O'Neill.

A. I would say between 40 and 50 feet.

Q. Something like 40 or 50 feet?

A. Then off——

Q. Pardon me?

A. Then she was laying off the side about 10 feet from the track.

Q. Was the car still plastered around the front end of the train, the engine?

A. That's right.

Q. Did you talk to the engineer at the scene of the accident?

A. There was two railroad men come down and I don't know whether they were engineers or who they were, but I showed them where the girl was and they thought it was on the other side, but I think they had seen my brother was over there looking for the girl. That is probably who they had seen.

Q. Do you recall Mr. Scobee being there then?

A. No, I don't.

(Testimony of John J. O'Neill.)

Q. He was the engineer of the train.

A. Well, I don't know, I wouldn't recognize him at all who [330] they was. They were in their work clothes there and I wouldn't—I didn't pay enough attention to them.

Q. And that is about what you saw concerning this accident? A. Yes.

Q. Have you ever seen a railroad engine or a railroad train dynamite its brakes?

A. Oh, I did one time there.

Q. And would you say from what happened on that occasion that you are telling us about——

A. Well——

Mr. McKevitt: Just a moment. I object to the form of that question. I don't think he has finished the question, the witness started to answer something.

The Court: Well, I thought he had finished the question. Will you read it, please?

(The question was read.)

Mr. McKevitt: Is he asking it——

Mr. Connelly: Is there an answer?

The Reporter: I have no answer.

Q. (By Mr. Connelly): Would you tell us what happened, what did you see, when you saw that railroad train dynamite its brakes that time you just mentioned?

A. Well, that tore up all the track and threw cars off.

Q. Did sparks fly from the bottom of the wheels?

(Testimony of John J. O'Neill.)

A. Well, I wouldn't say there was sparks flying, but she really tore up things.

Q. Have you ever seen that type of situation happen the second time or another time?

A. No.

Q. Have you seen trains make ordinary stops, stops which were not emergencies, stops which did not involve the dynamiting of the brakes?

A. Oh, yes.

Q. Pardon me just a moment, Mr. O'Neill.

Going back now to when you first saw the train coming out from under the Milwaukee viaduct, did you notice any slackening of the speed of the train at that time? A. No.

Q. Did you at any time before the collision and after you saw the train coming out from under the viaduct notice a slackening of the speed of the train? A. Well, no, I didn't.

Q. Is it your testimony that the train seemed to maintain the same speed?

Mr. McKevitt: That is leading and suggestive. Objected to on that ground.

The Court: Yes, I think it is leading.

Q. (By Mr. Connelly): Did the train maintain the same speed [332] from the time you saw it coming out from under the viaduct until it reached O'Neill crossing?

A. I couldn't say that.

Q. Can you estimate the speed of the train when you first saw it coming out from under the viaduct?

(Testimony of John J. O'Neill.)

A. Oh, between 55 and 60 miles an hour, I imagine.

Q. And I understand your testimony to be that you noticed no slackening of the speed?

A. Well, not enough to notice it much, I couldn't say for sure.

Q. Would you say that the train at any time between the time it emerged from under the underpass up until the time it crossed the crossing and hit the panel car dynamited its brakes?

Mr. McKevitt: Object to that, unless it is shown that the witness knows what dynamiting brakes is.

The Court: I will sustain the objection to that. He can tell how it appeared and how it behaved, and the jury can draw the conclusion.

Q. (By Mr. Connelly): Well, let's put it this way, then, Mr. O'Neill: From the time you saw the train coming out from the underpass until it reached O'Neill crossing, was there any noticeable slackening of its speed?

Mr. McKevitt: Well, I object to the form of that question. [333]

The Court: He may answer that.

A. Well, it is hard to say. You know, it is such a short distance there and you are watching both, you can't—

Q. (By Mr. Connelly): Well, the standard that I used was "noticeable." Either you did notice a slackening or you didn't. A. Well—

Q. On that basis and with that explanation of

(Testimony of John J. O'Neill.)

the meaning that I put on "noticeable," what would your answer be? A. You wouldn't.

Q. You wouldn't? A. You wouldn't, no.

Q. You didn't?

A. No, I don't think so.

Mr. Connelly: I believe that is all.

Mr. McKevitt: Does your Honor——

The Court: I think we may as well suspend, then. Adjourn now until 10 o'clock tomorrow morning.

(Whereupon, the trial in the instant cause was adjourned until 10 o'clock a.m., Wednesday, January 19, 1955.) [334]

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to-wit:)

The Court: Mr. O'Neill was on the stand, I believe, Mr. John J. O'Neill. Had you finished your direct examination, Mr. Connelly?

Mr. Connelly: Yes, your Honor.

The Court: All right, you may proceed with cross-examination, Mr. McKevitt.

JOHN J. O'NEILL

having previously been duly sworn, resumed the stand and testified further as follows:

(Testimony of John J. O'Neill.)

Cross Examination

Q. (By Mr. McKevitt): Mr. O'Neill, how long have you lived in that area where this accident occurred? A. 45 years.

Q. 45 years. And about how far from the crossing is your home? A. Oh—— [335]

Q. Approximately, is all?

A. Oh, approximately a thousand feet.

Q. A thousand feet? A. Yes.

Q. That house there is your brother's house, is that correct? A. My mother's.

Q. Oh, your mother's. I believe you were asked yesterday if you had seen a train operating over there which appeared to you to have been dynamited. How long ago was that?

A. Oh, that was about—probably 35 years ago.

Q. A freight train?

A. Freight train, yes.

Q. Steam locomotive? A. Yes.

Q. If I recall your testimony correctly, your attention was attracted to the approach of this train by a combination of the rumble of the train and certain whistles, certain whistle signals; is that correct?

A. Well, the rumble is first and then the whistle.

Q. Now, were those whistles long blasts, or how many blasts of the whistle did you hear?

A. Three.

Q. Huh? [336] A. Three.

Q. And were they long blasts or——

A. Just (indicating).

(Testimony of John J. O'Neill.)

Q. —sharp? A. Short, sharp blasts.

Q. And do you know how far the train was from the crossing—it would be the front end of it—when you heard those whistle blasts?

A. I would say about midway between the viaduct and the crossing.

Q. I see. You did not see the car, the truck, approach the crossing? A. No.

Q. And you don't know how long it was on the crossing before it was hit, do you? A. No.

Q. Which did you see first, the train or the truck, or was it just about simultaneous?

A. Just——

Q. What was your answer?

A. Well, just about the same time.

Q. About the same time. The speed of the train, am I correct that your testimony was 55 to 60?

A. That's right.

Q. That is just an estimate, isn't it? [337]

A. That is just an estimate.

Q. And probably it might have been 65; is that correct?

A. I wouldn't know, I just figured between 55 and 60, along there.

Q. You didn't have much opportunity to observe it, did you? A. No, that's right.

Q. To your knowledge, having living in that vicinity, that passenger train, prior to March, 1952, had been operating over that crossing about that time of day for a great many years, hadn't it?

A. Yes.

(Testimony of John J. O'Neill.)

Q. And there are a great many trains, freight and passenger, that cross that crossing day and night; isn't that true? A. Yes.

Q. Your answer is "yes"? A. Yes.

Q. With reference to where Erna's body came to rest, you fixed some distance. What was that?

A. Oh, I would say around 40, between 40 and 50 feet. I never stepped it off.

Q. I know, that is your estimate.

Q. And it is agreed, I think, that her body, with reference to the track, was on, we will call it, the O'Neill side [338] of the track?

A. Yes.

Q. Is that right. And how far from the rails, do you know?

A. Well, there is rails and then there is a short incline and—well, you would say over the shoulder, she was just over the shoulder.

Q. The shoulder of the what, the highway?

A. No.

Q. The shoulder of the road bed?

A. The road bed.

Q. I see, of the railroad bed. You estimate that the rear end of the train was how far from the crossing, did you say?

A. Oh, about 600 feet or approximately the length of the train.

Q. I see. That is from what you base your estimate, of the length of the train as compared with the distance from the rear end to the crossing?

A. That's right.

(Testimony of John J. O'Neill.)

Q. Did you notice any police officers or state highway patrolmen down there?

A. Yes, there was a patrol officer was there. I didn't talk to him there.

Q. Did you notice Mr. Everett down there that day? Mr. Everett? [339]

A. I don't remember now whether he was there while I was still there or not.

Q. I see. Now, as to the actions of the girl herself, do I understand your testimony to be that you saw her open the door of the car, of the truck?

A. Yes.

Q. Step out of the truck? A. Yes.

Q. Close the door of the truck? A. Yes.

Q. And then take a certain number of steps in a certain direction. How many steps did she take?

A. Oh, I would say—well, she got, I figured she was about 10 feet from the——

Q. From the what?

A. From the truck.

Q. And where was she standing at that 10 foot distance, in the track or on the side?

A. Well, from where we was standing, you couldn't see the rails or whether she was over the side of it or not.

Q. You mean whether she was between the rails or outside of one rail, you don't know?

A. That I don't know.

Mr. McKevitt: I think that is all.

The Court: And other questions? [340]

Mr. Connelly: I think that is all.

(Testimony of John J. O'Neill.)

The Court: All right, Mr. O'Neill, you may step down.

(Witness excused.)

Mr. Connelly: Call Larry O'Neill, please.

LAWRENCE SHAW O'NEILL,

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Connelly): Will you give us your full name, please?

A. Lawrence Shaw O'Neill.

Q. Keep your voice up so we can all hear, and most particularly the members of the jury, if you will, please.

Where do you live, Larry?

A. Ellensburg, Washington.

Q. And what is your dad's name?

A. John J. O'Neill.

Q. He is the man who just finished testifying here, of course? A. Yes, sir.

Q. Do you work or do you go to school at the present time?

A. Well, I am going to school now and taking a series of tests for entrance to West Point. [341]

Q. You plan to go to West Point?

A. Yes.

Q. And you have taken certain examinations for that, have you? A. Yes, sir.

(Testimony of Lawrence Shaw O'Neill.)

Q. When do you plan on finishing your high school work? A. June of this year.

Q. You are a senior, then, this year?

A. Yes.

Q. Do you have any brothers?

A. I have two brothers.

Q. Any sisters? A. And one sister.

Q. Have you lived in Ellensburg all of your life? A. Yes, I have.

Q. And you live with your dad, of course, at the place where he told us that he lives?

A. Yes.

Q. That is about, as I understand it, a thousand feet from this crossing, or a thousand yards from this crossing that we are speaking of?

A. Well, no, I don't live there. That is where my grandmother lives.

Q. Oh, your dad was speaking of the home place or his mother's place when he gave where he did live? [342]

A. Where he did live, yes.

Q. Where do you folks live now?

A. It is about four miles away from that place.

Q. Down the O'Neill Road further.

A. Well, it is in a, oh, a westerly direction.

Q. I see. A. From there.

Q. Directing your attention back to the 8th of March, 1952, Larry, which of course is the day that this accident occurred, and particularly the afternoon of that day, where were you?

A. I was at this place, my uncle's place, and

(Testimony of Lawrence Shaw O'Neill.)

we were building a corral across the highway from it.

Q. And who all was there with you?

A. My dad and my uncle and my younger brother.

Q. Have you had a chance to take a look at this map and orient yourself with it?

A. Yes, I have.

Q. And you are, then, familiar with what this is supposed to depict? A. Yes.

Q. And the directions, and so on, with reference to it, north being generally toward the top of the map, south, of course, the bottom, east to the right, and west to the left? [343] A. Yes.

Q. I will turn this around a little bit. And do you recognize this (indicating) as being your grandmother's home place, the O'Neill place?

A. Yes.

Q. And do you recognize this as the O'Neill crossing? A. Yes.

Q. This particular day, about where were you and your father and your uncle and your brother working?

A. Would you like me to point it out?

Q. Yes, I think if you would come down, so as to get this squared away all around.

(Witness goes to map.)

Here is a pencil if you would like to mark it.

Mr. Etter: Larry, will you stand off to the side so the jury can see you mark it?

(Witness places mark on Exhibit 1.)

Q. (By Mr. Connelly): That is about the vi-

(Testimony of Lawrence Shaw O'Neill.)

cinity that you and the other men were putting up the corral, is it? A. As I remember it.

Mr. McKevitt: Will you mark that "L.O."?

The Court: Yes, I think if you will put his initials to distinguish it from the others.

(The initials "L.O." were placed next to the mark made by the witness by Mr. Connelly.)

Q. (By Mr. Connelly): Now, on this particular day, and while you are still standing here next to this map, did something occur which drew your attention to the railroad track itself?

A. Yes, the whistle of the train was my first——

Q. The first thing that you heard was the whistle of a train? A. Yes.

Q. And what did you do then when you heard the whistle of the train?

A. Well, I started watching it, of course.

Q. Did you turn and start to watch it?

A. I just turned my head like this (indicating), and we had poles, a couple of poles over our shoulders, see, we were faced away from it, and I just looked like that.

Q. Is it a practice of yours to turn and watch a train when you hear it?

A. Yes, I never see enough of them.

Q. You always watch a train when it goes by?

A. Yes.

Q. Well, where was this train then when you first heard the whistle and turned your eyes and saw it?

A. Oh, when I first glanced at it, it was just coming under the underpass.

(Testimony of Lawrence Shaw O'Neill.)

Q. Just coming under the underpass? [345]

A. Yes.

Q. Had any part of it emerged from the underpass toward the west?

A. Yes, the—oh, anywhere from the large part of the engine back a car. The engine and a car.

Q. About an engine and a car? A. Yes.

Q. Would you make, if you could, an "X" or a line on the map and initial it as to about where the front of the engine was when you first heard the whistle and saw it? That map is, of course, scaled, if that is any help to you, one inch being 20 feet.

(The witness placed a mark on Exhibit 1 and initialed it.)

Q. All right, I think it might be better if you returned to the chair, Lawrence.

(Witness resumes stand.)

Now prior to that time, had you heard any sound at all of a train whistle?

A. I hadn't noticed any.

Q. You hadn't noticed any. As you turned your eyes and glanced up here toward the direction of the tracks, did you see anything with reference to the crossing? A. No, I didn't.

Q. The O'Neill crossing? [346] A. No.

Q. Did you notice an automobile on the crossing? A. No.

Q. Did you at any time after first noticing the train look back and examine the crossing?

A. As he was coming farther on down the track, I did, yes.

(Testimony of Lawrence Shaw O'Neill.)

Q. And what did you see then when you looked at the crossing?

A. Well, the truck was stalled there on the—or was sitting there on the tracks.

Q. What kind of a whistle was it that you heard when you first heard it? A. Two long blasts.

Q. Two long blasts. And by a long blast, in seconds, could you estimate it? A. Well—

Q. Pretty hard to do, but if you can. If you can't, that is all right, too.

A. Well, I have heard the estimates here in the court and I think that would be just about right.

Mr. McKevitt: A little louder, please?

A. The two seconds for each blast and about the same in between.

Q. (By Mr. Connelly): That is your estimate of it, about two seconds a blast? [347]

A. Yes.

Q. And you say you heard two of these?

A. Yes.

Q. And was it after that that you glanced down toward the crossing?

A. No, it was when he got about halfway between the trestle and the crossing, well, he whistled three real sharp fast ones, and then was when I glanced at the crossing.

Q. Can you estimate the speed of the train as you saw it come out from under the underpass?

A. Well, I would say it was approximately 50 or 55 miles an hour.

(Testimony of Lawrence Shaw O'Neill.)

Q. Did you recognize the automobile when you saw it as belonging to someone that you may have known? A. No, I didn't.

Q. Did you see anyone in the automobile when you first looked at it? A. No.

Q. Tell us then what you saw, if you saw anything more, with reference to the car at the crossing as it lay there stalled in the middle of the tracks.

A. Well, I looked down there and I was looking at the car, and it was just a split second until she jumped out of [348] the car and she hesitated there for a moment and started running, and then after she had taken three or four steps, well, the impact occurred and the dust and everything, I couldn't see anything more.

Q. There was a huge crash, was there, and a lot of dust thrown up in the air?

A. Yes, there was.

Q. Well, then, to kind of put this thing together, when you first saw the automobile, then, as I understand your testimony, the train was roughly half-way between the underpass and the crossing?

A. Yes.

Q. Or about where your dad made this "X" mark. And at that moment, the girl was still in the automobile? A. Yes.

Q. Which door of the car did she come out of?

A. The left side.

Q. That would be the side——

A. The driver's side.

(Testimony of Lawrence Shaw O'Neill.)

Q. —most to the west. What exactly, if you can picture it again in your mind, did she do or did you see as the door of the car first came open? Try to recall every little thing, if you can, to add anything to what you have already told us.

A. Well, she just jumped out and paused there for that moment standing by the car. [349]

Q. Did she pause before or after she shut the door of the car?

A. I didn't even watch the door to see if it did close or not.

Q. You don't recall whether it was closed?

A. I don't know whether she did that.

Q. Could you tell which way she was looking as she paused there momentarily?

A. Well, as I see it now, she was standing facing kind of toward the front of the car, and I couldn't see her, it was quite a ways away, and I couldn't see what way her head was turned, I didn't notice it.

Q. Pardon me?

A. I didn't notice what way her head was turned.

Q. I see. Could you estimate in time the length that she paused there frozen by the door of the car?

A. Probably one or two seconds. It was a very short time.

Q. Then when she started to move, did you say she started to run? A. Yes.

Q. And which direction did she run?

(Testimony of Lawrence Shaw O'Neill.)

A. Well, almost parallel to the truck and a little bit more north, you know.

Q. Almost parallel—— [350]

A. Up the tracks.

Q. ——to the truck? A. Yes.

Q. To the truck or to the tracks?

A. To the truck.

Q. In other words, she started running in a westerly direction, angling to the north?

A. Yes, it was probably closer to due north, as it is on that map.

Q. Closer to this angle (indicating)?

A. Yes.

The Court: It is a little misleading. You mean she ran perpendicular to the track, at right angles of the track, straight up from the track?

What I have in mind is the true north there as indicated by that arrow is not straight up on the map. A. Yes.

The Court: All I am trying to do is to get just what your testimony is on that.

A. Well——

Q. (By Mr. Connelly): There is true north on the map, Larry (indicating). A. Yes.

Q. Did she run roughly——

A. That is approximately. [351]

Q. ——the same direction, about that direction, away from the car? A. Yes.

Q. Which would be about due north?

A. Yes.

(Testimony of Lawrence Shaw O'Neill.)

Q. But angling, of course, from the position of the automobile? A. Yes.

Q. How many steps would you say that she had taken before the train crashed into the automobile?

A. Oh, three or four, just got a good start.

Q. Three or four steps. And feet on the ground, about how many would you say she covered?

A. Well, I couldn't say that, because I couldn't judge the distance as she was running closer toward me, see.

Q. After this crash, then what did you do?

A. Well, I went over and told my aunt to call the Sheriff, and then I came back over to that barn there where we were working and I just stood there and watched.

Q. You came back over where you had been working and stood there? A. Yes.

Q. You didn't go over across the track with your Uncle Leo? A. Not then. [352]

Q. Did you later?

A. Oh, it was about two or three hours later I went over there.

Q. Two or three hours later when——

A. It was after everything was all cleared out.

Q. When the officers had all gone?

A. Uh-huh.

Q. Did you estimate the speed of the train as 50 to 55 as you saw it coming out——

A. As I saw it, yes.

Q. Did you notice the train slow down or speed up or do anything at all between the time you saw

(Testimony of Lawrence Shaw O'Neill.)

it come out of the underpass and the time it got to O'Neill crossing?

A. Well, I didn't notice anything spectacular about that.

Q. Specifically, did you notice the train slow down to any noticeable degree between those two points?

A. Well, I didn't watch the train very much after it hit that midpoint, but before that I didn't notice any reduction in speed.

Q. In other words, between here, where you first saw it, and about here, when you first noticed the automobile (indicating on exhibit) at the crossing and the train in this position, you did not notice any slowing?

A. That is the only place where I was watching it real closely, and I didn't notice any reduction in speed, no. [353]

Q. And you did not notice any reduction in speed? A. No.

Q. After the train hit the car and drove it down the track, did you notice where the train finally came to a stop?

A. Yes, I would estimate the front end of the train to be about 1,400 feet from the crossing.

Q. The front end of the train would be about 1,400 feet from O'Neill crossing. Did you have occasion to notice how many cars, exclusive of the engine, made up this train? A. No, I didn't.

Q. Do you have any recollection at all with reference to the length of the train so you could esti-

(Testimony of Lawrence Shaw O'Neill.)

mate, as you picture it in your own mind now, about how many cars there were in it? Were there two or three or eight or nine, or can you get a picture of it at all to estimate?

A. Oh, yes, it was just an average passenger train, possibly—well, six or eight cars in it.

Q. I see. Now, getting away from the collision for a minute, are you familiar with the crossing and the approach to the crossing from the south going toward your grandmother's place?

A. Yes, I am.

Q. Have you traveled over it a number of times? [354]

A. Oh, about 10 or 15 times, yes.

Q. And referring now particularly to times around the 8th of March of 1952, can you give us a description of the condition of the crossing at that time?

A. Well, I hadn't driven the road before that, I was only 13 years old, and I had no driver's license and I hadn't driven that much to be driving on that road.

Q. Had you ridden over it with your dad or with other people? A. Yes.

Q. Do you recall, as a passenger in the car, anything with reference to the condition of this crossing as you came to it from the south?

Mr. McKevitt: On March 8th, you mean?

Mr. Connelly: Yes, around the same date, March 8th of '52.

A. Well, the only thing that I would remember

(Testimony of Lawrence Shaw O'Neill.)

would be the incline of the road and that turn is on the incline.

Q. And what do you remember with reference to that?

A. Well, as you start up the hill, well, there is—you have to turn right while you are on that hill going up to the tracks from the south.

Q. And in your recollection, is there an appreciable incline there as you come up this last bit just around the turn? [355]

A. Yes, it is rather short.

Q. Do you have any recollection—and I refer to around the same time, March 8th of '52—of the condition of the right of way east of the crossing with reference to brush, undergrowth, foliage, et cetera?

A. With relation to visibility?

Q. Yes?

A. No, I know there was brush there, but I don't know how it affected visibility.

Q. I see.

A. At all.

Mr. Connelly: Mr. Taylor, are all the exhibits here?

The Clerk: Yes, sir.

Q. (By Mr. Connelly): Well, excluding for the moment, then, the brush and undergrowth and foliage, as it may or may not have affected visibility as you recall it, what, if anything, can you tell us about the ability to see east up the right of way as you approached O'Neill crossing as it may be affected by the angle of the approach?

(Testimony of Lawrence Shaw O'Neill.)

A. Well, the angle of approach, you are approaching from the smaller angle and you have to look back over your shoulder when coming from the south to see the east right of way.

Q. In other words, you describe this as a rather acute angle (indicating). [356]

A. Yes.

Q. For an automobile as it comes up to a tangent onto the track?

A. Yes, until you get right up on that hill.

Q. I see. Larry, showing you Defendant's Exhibit No. 30, I will ask you to examine that, particularly with reference to—I guess it would be Photograph 1 there and 2, and ask you if that depicts fairly, as you recall it, the condition of the crossing with reference to the absence of ballast or dirt?

A. Yes, it does.

Q. To the planks? A. It does.

Q. That is just about the way it was?

A. Uh-huh.

The Court: What is that number, Mr. Connelly?

Mr. Connelly: That is No. 30, your Honor, the panoramic photo.

The Court: Oh.

Q. (By Mr. Connelly): Well, with that picture in mind, Larry, as you would ride over this crossing, would there be any difference between the east end of this crossing and the west end of the crossing?

A. Well, since I have been driving on that road,

(Testimony of Lawrence Shaw O'Neill.)

I have [357] always gone to the left-hand side of the road to go across that thing.

Q. What is the reason for that?

A. Well, it is just like on that picture, there is a big hump there, there is a hump there on that one side of it, and on the other side there isn't. I don't know, just take the easiest way.

Q. Did you have occasion to talk with anyone at the scene, other than your dad and your brother, of course? A. No, I didn't.

Q. Did you know Erna Mae?

A. No, I didn't.

Mr. Connelly: I believe that is all. You may examine, Mr. McKevitt.

Cross-Examination

Q. (By Mr. McKevitt): You are past 16 now, are you, Larry? A. Yes.

Q. When will you be 17?

A. The 15th of June.

Q. And you have just recently taken examinations for entry into West Point? A. Yes.

Q. What subjects were you examined on, mathematics or what kind? [358]

A. Well, all of high school mathematics and——

Q. Calculus?

A. Yes—no, no calculus in the test.

Q. I see. You don't know whether you passed or not, do you? A. No.

Q. I don't doubt you did. Now, with reference

(Testimony of Lawrence Shaw O'Neill.)

to the whistle signals, you did hear two long blasts of that whistle on that train that day?

A. Yes.

Q. And you space those two long blasts in some manner. What would be the length in seconds of time of each blast of the whistle?

A. Approximately two seconds for the blast and two seconds space.

Q. Two seconds of blast, two seconds space. And then later you heard three real sharp blasts?

A. That's right.

Q. Is that correct? And do I understand that when you heard the first long blast of the whistle, that the front of the Diesel was—was it under the underpass or overpass, was it under the overpass, the front end of the locomotive?

A. Well, I was looking toward the front end.

Q. Yes.

A. And it could have been either part of the Diesel or clear back to maybe a car when I first looked, when I first saw the train.

Q. Is it possible from the angle that you looked at it that when you heard the first long blast of the whistle, that the Diesel had not yet got under any portion of the overpass? That is possible, isn't it?

A. No, I don't think so, I could tell it that near.

Q. All right. And can you tell us how far the front end of the train was from the crossing when you heard the first of these three sharp blasts?

(Testimony of Lawrence Shaw O'Neill.)

A. About midway between the trestle and the crossing.

Q. Midway between the trestle and the crossing. You heard your father's testimony about the girl closing the door of the car after she got out of it?

A. Yes.

Q. Whether that happened or not, you don't know? A. That's right.

Q. And when she took these three or four steps, was she running or walking? A. Running.

Q. And you estimate that she had traveled how many feet before she was struck?

A. I couldn't estimate that because she was running toward [360] me, pretty close to toward me. I wouldn't estimate that.

Q. Had she taken these three or four steps before the Diesel hit the truck? A. Yes.

Q. She had taken three or four steps before the Diesel hit the truck. And from what you observed there, she took a direction at least partially to the west, didn't she, toward Seattle, we'll say?

A. Yes.

Q. She was running away from the train in some direction? A. Yes.

Q. And if I understood your answer to Mr. Connelly's question properly, insofar as you could say, having in mind this is true north the way my pencil is (indicating), she gets out of the truck here—— A. Down at the crossing.

Q. Or down at the crossing, rather—I had the

(Testimony of Lawrence Shaw O'Neill.)

wrong road here—and then her course would be somewhat like that (indicating); is that true?

A. Yes.

Q. From what you observed there, isn't it a fact that if she had taken just two or three steps to her left, she would have been clear of the track and wouldn't have been struck? [361]

A. Right.

Q. Isn't that correct?

A. Right.

Q. You know what I mean, if she had taken two or three steps toward the other rail, the rail on the opposite side, she would have been in the clear, wouldn't she?

A. She would have been in the clear. I think she was clear of the tracks, though, the other way, too.

Q. Yes.

A. But she would have been that much better off if she had went the other way, right.

Q. In other words, her body was thrown to the north, wasn't it, and to the west?

A. Yes.

Q. Now, prior to March 8, 1952, Larry, it is your testimony, as I understand it, that you had been over this crossing 10 or 15 times; is that correct?

A. No, he asked me how many times I had driven over it.

Q. Well, you—

A. That was 10 or 15 times, but I hadn't driven over it before then.

Q. Well, that is because you didn't have a license to drive?

A. Yes.

Q. But since you have had a license, have you

(Testimony of Lawrence Shaw O'Neill.)

driven over the crossing? [362] A. Yes.

Q. How many times was that?

A. Oh, possibly 10 or 15 times.

Q. And how long ago was that?

A. Well, it is—well, I don't think I ever drove over it before I got my license, but after that it has been about 10 or 15 times, and that is since last June.

Q. Since last June. That is what I am getting at. A. Yes.

Q. And you state, from your experience in driving the car and having in mind the condition of the crossing generally or at any particular time, that in driving toward the O'Neill side, we'll call it, that when you would get up by the crossing to make your turn, you swing out on the left, do you not?

A. That's right.

Q. Instead of approaching the crossing ordinarily on this road that I am pointing to, instead of keeping your car to the right of what we might call the center line, because of the curvature, no other cars approaching, you get over to the left side, do you not, in order to make that turn more easily?

A. Not because of the curvature, because of the planks on the crossing. [363]

Q. Planks on the crossing, all right. Now, Mr. O'Neill, Mr. Connelly showed you Exhibit 31—

The Clerk: He showed him Exhibit 30, I think.

Mr. McKevitt: Oh, was it 30?

Q. And he confined you to the condition of the

(Testimony of Lawrence Shaw O'Neill.)

planking as shown in the first of a series of four pictures. You see, this is a panoramic view.

A. Uh-huh.

Q. Now, examine the whole photograph. Observe the Milwaukee viaduct is up here so you are oriented, are you not (indicating)? A. Yes.

Q. Now, it is agreed, Larry, that these photographs were taken March 10th, that is, of 1952, two days after the accident, and that the camera in this picture is 25 feet south of the crossing approaching the O'Neill side. It is a fact, is it not, that those photographs are a fair representation of the conditions that existed on that crossing, to your knowledge, on the 8th of March, 1952; isn't that correct?

A. Yes, they are.

Q. That's right.

The Court: What number was that again, Mr. McKevitt? I think you gave it, but I missed it.

Mr. McKevitt: No. 30. [364]

The Court: All right.

Q. (By Mr. McKevitt): Larry, I will show you another panoramic view, and this is Exhibit 31 of Defendant's, and for your information it is agreed that this picture was likewise taken on the 10th of March, 1952, and it is agreed that the camera was in the center of the road 180 feet south of the crossing. Will you examine the whole picture?

A. I didn't go down this far down the road very soon after the accident, no.

Q. Well, are you able to state whether or not what is shown in that picture is a fair representa-

(Testimony of Lawrence Shaw O'Neill.)

tion of the conditions that existed on the 8th of March, general conditions, 1952? A. Oh, yes.

Q. It is, is it not?

Mr. McKevitt: That is all, your Honor.

The Court: Any redirect examination?

Mr. Connelly: Yes, your Honor, we have a brief redirect.

Mr. McKevitt: Oh, may I, I did overlook just one thing?

The Court: Yes, all right.

Mr. McKevitt: May I be indulged, your Honor?

Q. I will show you Defendant's Exhibit 17, Larry, and it [365] is also agreed between us here in court on behalf of each of our clients that that picture was taken on March 10, 1952, two days after the accident, and the camera is east of the crossing and showing the view to the west. Will you examine that, please? Is that a fair representation of the condition that existed on that crossing on that date?

A. Yes.

Q. Now, I will ask you the same question with reference to Defendant's 16?

A. What one is that one?

Q. That was also taken two days after the accident, and the camera in this instance is west of the crossing and looking east, just the opposite of the other one. Is that a fair representation of the condition of the crossing at that date?

A. Yes.

Mr. McKevitt: The answer was "yes," if the jurors didn't hear it. That is all.

(Testimony of Lawrence Shaw O'Neill.)

Redirect Examination

Q. (By Mr. Connelly): Mr. McKevitt asked you something, Larry, with reference to the direction in which the girl ran and what might [366] have happened had she run some other direction, and it is not quite clear to me what you meant by your answer.

As I understand it, when you saw the girl and before she started to run, she was somewhere near the left front door of the car?

A. The left door.

Q. The left door. There was only one door, of course?

A. Yes.

Q. Two doors in a panel truck. When she started to run, she ran generally in a northerly direction?

A. That's right.

Q. And could you tell whether the left front door of the panel truck was closer to the northern-most rail of the track or to the southern-most?

A. It looked closer to the southern-most.

Q. It looked closer to the southern-most.

A. Yes.

Q. And the truck, of course, was some six, seven feet behind, then, as she stood there by the door, wouldn't that be correct?

A. Uh-huh.

Q. And the rails from the southern-most to the northern-most are something over 4 feet, 4 feet, 8½ inches, I believe Mr. McKevitt said. [367]

Mr. McKevitt: From inside of rail to inside of rail. That is the gauge which is common.

Mr. Connelly: Inside of rail to inside of rail.

(Testimony of Lawrence Shaw O'Neill.)

Q. So, as a matter of fact, it is actually about a toss-up, isn't it, which way that——

Mr. McKevitt: I think this is cross-examination of his own witness.

The Court: Well, I will permit him to answer. I think it is a little bit leading, but he may answer it.

Mr. McKevitt: Understand the question?

The Court: Do you understand the question?

Q. (By Mr. Connelly): I say it is about a toss-up which way she ran, isn't it?

A. I don't think so.

Q. Pardon me? A. I don't think so.

Q. You don't think so? A. No, I——

Mr. McKevitt: Go ahead, finish.

Q. (By Mr. Connelly): Did you have occasion to see the truck as it lay on the track with the engine bumped into it after the collision, Larry?

A. Would you repeat that, please?

Q. I say, did you have occasion to see the truck as it lay on the track after it was bumped into by the engine [368] and, naturally, after it came to rest, as you say, some 1,400 feet down the track?

A. No, I didn't go up there.

Q. You didn't go down at all to see?

A. Not up to the engine.

Mr. Connelly: Will you mark this. Well, we will mark this later, then.

The Court: Yes, all right.

Q. (By Mr. Connelly): With reference to Defendant's Exhibit 29, Larry, Mr. McKevitt ques-

(Testimony of Lawrence Shaw O'Neill.)

tioned you concerning visibility in the right of way. Will you examine Defendant's Exhibit 29, please, and tell us whether or not your grandmother's house appears in that picture?

A. Yes, that is it there (indicating).

Q. That is it there. And further examining Defendant's Exhibit 29, you notice what appears to be a billboard showing in the photograph.

Mr. McKevitt: I can't hear you, Mr. Connelly.

Q. (By Mr. Connelly): Do you notice what appears to be a billboard showing in the photograph?

A. Yes.

Q. And between the house and the billboard, would that be the position where you fellows were working that day? A. Yes.

Q. And would it be relatively close to the billboard, the field in which you were working? [369]

A. No, that was about halfway in between.

Q. Halfway in between.

Mr. Connelly: If your Honor please, I think this is——

The Court: Is that in evidence?

Mr. Connelly: That is in evidence.

The Court: Exhibit what?

Mr. Connelly: Exhibit 29, Defendant's Exhibit 29.

The Court: Oh, Defendant's Exhibit 29. Perhaps you might have the witness mark in there the location. I am not looking at the photograph, I don't know just how definitely he has fixed the spot.

Mr. Connelly: Well, there is his house, your

(Testimony of Lawrence Shaw O'Neill.)

Honor, (indicating) and there is the billboard on the field, and they were in a field, apparently from his testimony——

The Court: Well, yes, you use your own judgment. I won't suggest one way or the other that it be marked or not.

Mr. McKevitt: Oh, I see what you mean.

Mr. Connelly: Here is the house, the O'Neill house; there is the billboard which is down toward the highway, of course, and in between, I judge along in here, is where they were working.

Mr. Etter: Let's mark the house and billboard, then, don't you think so?

Mr. McKevitt: Well, if the witness, if the Court [370] please, can more accurately locate where the boy was——

The Court: Yes, I suppose.

Mr. McKevitt: I have no objection to that, if he can do it.

The Court: I think Mr. Etter's suggestion was that he mark the house and the billboard.

Mr. Connelly: Draw something right in there, an arrow. I don't know, these pencils won't write on the photograph.

Mr. Etter: Maybe a pen will do it.

(Mr. Connelly marks on Exhibit 29.)

Mr. Connelly: And, likewise, I will mark and label the billboard.

(Mr. Connelly placed another mark on Exhibit 29.)

Q. Now, if you will make an "X", if you can,

(Testimony of Lawrence Shaw O'Neill.)

Larry, on the photograph showing approximately where the men were working.

A. I will put an arrow. (Marking exhibit.) It isn't in a direct line with the house and the billboard, but——

Q. Well, it approximates the position where the men were standing and working? A. Yes.

Q. Showing you Plaintiff's Exhibit 12, Larry, will you examine that, please, and tell the jury whether or not [371] that fairly depicts the angle of approach and the degree of grade of approach of an automobile traveling toward O'Neill crossing coming from the south?

Mr. McKevitt: I object to that as asking for a conclusion of the witness. I believe the photograph speaks for itself, your Honor.

Mr. Etter: No, I think——

The Court: You asked if that was a fair representation?

Mr. Connelly: Yes.

The Court: I will overrule the objection.

Q. (By Mr. Connelly): Fairly depicts, I believe I said? A. Yes, it does.

Q. Your answer is yes, that it does.

Mr. Etter: Which exhibit number is that, Mr. Connelly?

Mr. Connelly: That is Plaintiff's Exhibit No. 12.

Mr. Etter: No. 12.

Q. (By Mr. Connelly): Showing you Defendant's Exhibit 24, will you examine that, please, and tell the jury whether or not that is a fair repre-

(Testimony of Lawrence Shaw O'Neill.)

sentation of the condition of the foliage as it existed at the time of the accident or a day or so afterwards? A. Yes, it is.

Mr. McKevitt: What number is that, Ellsworth, please? [372]

Mr. Connelly: That is No. 24, Defendant's exhibit.

Mr. Etter: Defendant's?

The Court: Yes.

Q. (By Mr. Connelly): And showing you Defendant's Exhibit 22, will you take a look at that, please, Larry, and tell us again whether or not that fairly represents the condition of the foliage on the southern side of the right of way as it existed about the time of the accident?

A. Yes, it does.

Q. And showing you Defendant's Exhibit 23, will you look at that, and I will ask you the same question as to whether or not that fairly represents the condition of the foliage along the southern side of the right of way as it approaches O'Neill's crossing? A. Yes.

Q. And Defendant's Exhibit 21, will you examine that, please, and I will ask you the same question? This is, as you can see, they are labeled at the top—— A. Yes.

Q. And the camera, of course, is facing westward in each instance, and in this particular Exhibit 21 it is 350 feet back from the crossing, and I will ask you whether or not that is a fair representation of the condition [373] of the foliage along

(Testimony of Lawrence Shaw O'Neill.)

the south side of the right of way as it comes up?

A. Yes, it is.

Q. Your answer is yes in each instance?

A. Uh-huh.

Mr. McKevitt: The last one was what?

Mr. Connelly: The last one was 21, Mr. McKevitt.

Mr. McKevitt: Oh, yes. You examined on 21, 22, and 24, is that correct, Ellsworth?

Mr. Connelly: Examined on 12.

Mr. McKevitt: Oh, yes.

Mr. Connelly: 21, 22, 23, 24 and 29. 29 was the one that was marked by the boy.

Mr. McKevitt: Okay.

Mr. Connelly: I believe we may be approaching the noon recess, your Honor, but I think, unless you have some objection, I would like to ask the jury to examine Exhibit 29 again, the one the boy marked.

The Court: Yes, all right.

Mr. Connelly: To get at this time where they all stood.

Mr. McKevitt: Well, that is with reference to the billboard and the house?

The Court: Shows the billboard and the house.

Mr. Connelly: That is the one with reference to the billboard and the house. [374]

And that is all I have, Larry, thank you.

The Court: Do you have any other questions, Mr. McKevitt?

Mr. McKevitt: No, your Honor.

The Court: You may step down, then. Do coun-

(Testimony of Lawrence Shaw O'Neill.)

sel have any objection to the jurors examining this during the recess?

Mr. McKevitt: No.

Mr. Etter: No, your Honor.

The Court: All right, you may take that out with you to the jury room and examine it, and we will recess for ten minutes.

(Witness excused.)

(Whereupon, a short recess was taken.)

The Court: Proceed.

Mr. Etter: Call Mrs. Everett, please.

RENA EVERETT,

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Etter): Mrs. Everett, I am going to ask you, I know your voice [375] isn't very loud, I am going to ask you to speak out as well as you can. A. All right.

Q. So the jurors and the Court and counsel can hear everything that you have to say.

Your name is Mrs. Ernest Everett?

A. Yes, Rena Everett.

Q. Rena Everett. And you live near Ellensburg with your husband, Ernest Everett, who has testified? A. Yes.

Q. You people have been married, or were married, 29 years last Saturday? A. Yes.

(Testimony of Rena Everett.)

Q. You have three children, as I understand it, or four? A. We had four.

Q. You had four. Three girls and a boy, is that correct? A. Yes.

Q. And Erna Mae was one of the daughters?

A. Yes, the youngest.

Q. The youngest. She was about 16 years and 11 months at the time of this accident?

A. That's right.

Q. Is that correct? A. That's right.

Q. And on the day of this accident, it was a Saturday, was it, Mrs. Everett? [376]

A. Yes, it was.

Q. It was. Were you at the home place on that date? A. Yes, I was.

Q. Mr. Everett was home?

A. Well, yes, he was working out, he wasn't in the house.

Q. He wasn't in the house, he was working?

A. Yes.

Q. Directly in front of your house facing or running parallel, rather, with the county road, is there a little stream or creek? A. Yes.

Q. And Mr. Everett has built a little bridge of planking across that?

A. Well, he was—that bridge was there when we bought the place.

Q. When you bought the place?

A. But there was another bridge below that, an old bridge that he was tearing out that afternoon.

Q. That he was tearing out?

(Testimony of Rena Everett.)

A. Uh-huh, tearing it out of there.

Q. You say below, would it be to the east?

A. Below——

Q. Beg your pardon? A. South of it.

Q. To the south?

A. South of the bridge that we use.

Q. South of the bridge which you use?

A. Uh-huh.

Q. All right. And on that morning, do you recall Erna Mae, about the time that she left to go down to the mail box?

A. Well, it was in the afternoon when she went to the mail box.

Q. It was in the afternoon?

A. Uh-huh.

Q. And do you, to your knowledge, know whether she had any personal or special purpose that day in going after the mail?

A. Well, she had ordered some dress patterns and she kind of was looking for them, she expected them to be in the mail, some of them, anyway.

Q. And had so indicated to you?

A. Yes.

Q. I see. Where were you when Erna Mae left to go after the mail?

A. I was in the house.

Q. You were in the house?

A. I was sewing, I was sitting by a window, I watched her as she left. [378]

Q. I see. Was she out in the yard working just before she left?

(Testimony of Rena Everett.)

A. She had been in the morning. They had been dragging the road and kind of leveling it up. She had been helping her father.

Mr. McKevitt: It is a little difficult to hear in here, Mrs. Everett.

Mr. Etter: She had been helping her father drag the road in the morning.

Mr. McKevitt: I see.

Q. (By Mr. Etter): And did she then come into the house?

A. Yes, and they were all in for lunch, and then my husband had gone back out and the little boy and were tearing out the old bridge and she was helping around the house then.

Q. I see. And when she left, she left from the house, she wasn't outside? A. Yes.

Q. All right. Did you see her leave?

A. Yes, I did.

Q. Did you see the truck leave the front yard?

A. Yes, I did.

Q. And when was the last that you saw of the truck?

A. I saw—I saw her as she went out through the outer gate. It was open, the outer gate to the country road [379] was left open at that time.

Q. I see.

A. And I noticed as she went out our lane and onto the county road and turned to go.

Q. Mr. Everett opened the gate, did he not, up by the barn? A. Yes.

(Testimony of Rena Everett.)

Q. That was the one that fences in the property by the barn? A. Yes.

Mr. McKevitt: Do you understand, Mr. Etter, it is her testimony that is the last time you saw Erna was when Erna went out the gate?

A. She had gone out the gate and out the outer gate.

Mr. Etter: Out the outer gate.

Mr. McKevitt: I see.

A. Onto the county road.

Mr. McKevitt: That is the last time?

Mr. Etter: I am going to find out.

Q. Is that the last time you saw the panel truck, after she went through the outer gate onto the county highway?

A. That is the last time I ever saw it.

Q. I see. Did you later on that afternoon, did you go down to the railroad yourself, Mrs. Everett?

A. No.

Q. You did not?

A. Mrs. Klocke called me and Mrs. Klocke called me and told me there had been an accident at the crossing, and I never even thought of the train, I was thinking of cars on the highway. And I went out to call Mr. Everett to tell him, and he wasn't within calling distance, I couldn't make him hear me. I didn't know, but he had already started up and this Whitson had come down and picked him up and taken him back up there, though I didn't know that.

Q. You did not know that?

(Testimony of Rena Everett.)

A. No. So I come back and I called Mrs. Klocke and asked her how bad, where the accident was, and she said it was on the railroad crossing. And I hung up and started to run out that way and I got out to about to the gate and I know something compelled me to look back, and my mother was standing there and I just turned and walked back to the house and I stayed there.

Q. I see. Your mother lives with you?

A. Yes.

Q. You did not, then, see the crossing or the track or the area that is indicated on the chart down at the crossing on that day?

A. No, I didn't. [381]

Q. I see. Had you been over that crossing yourself, Mrs. Everett?

A. Oh, yes, we had lived there about two years.

Q. I see. And when was the last time that you had been over the crossing?

A. The day before.

Q. The day before? A. Yes.

Q. Was that in the same car? A. Yes.

Q. The panel Dodge?

A. In the panel, yes.

Q. And were you accompanied by your husband, Mr. Everett, that day? A. Yes, yes.

Q. How was the Dodge automobile? I mean, how did it operate that day?

A. It worked all right.

Q. Beg your pardon?

(Testimony of Rena Everett.)

A. It worked just like always, just all right, just fine.

Q. I see. When you drove to town, where did you go that day?

A. We went to town to get groceries and supplies.

Q. That was the day before? A. Yes.

Q. I see. Were you acquainted, Mrs. Everett, with the crossing? A. I am.

Q. That is the grade crossing where this accident occurred? A. Yes.

Q. I will show you the exhibit here which is marked No. 30, and there is indicated a panoramic view of the general area extending from the crossing, as you can see, down to the overpass. I will ask you to examine the crossing particularly there. This picture, as you can see, was taken, or has been indicated was taken, a couple of days or so after that accident. A. Yes.

Q. Would you say that is a fairly accurate representation of the crossing? A. Yes.

Q. And is it a fairly accurate representation, likewise, of the outer approach or the outer plank-ing as it appears there? A. Yes.

Q. It is.

The Court: What number is that again?

Mr. Etter: That, your Honor, is Defendant's 30, No. 30. [383]

Q. Had you noted the condition that you have seen or that you pointed out in the Defendant's

(Testimony of Rena Everett.)

Exhibit No. 30 before with respect to the depression there just before you reach the planking?

A. Yes, we had, we had talked about it.

Q. I see.

Mr. McKevitt: I move to have that last remark stricken, that "we talked about it."

The Court: Yes, I think that should be stricken and the jury instructed to disregard it.

Q. (By Mr. Etter): You had seen that, you had noticed that area before, however?

A. Yes.

Q. I see. Now, as you approach in an automobile, as you approach that particular crossing, Mrs. Everett, can you give us some idea of the visibility, the driving visibility, whatever it might be as you approach the crossing, of the overpass which appears on the chart, toward the east end of the chart as marked?

A. I find that I can't see the overpass until I am almost directly on the track.

Q. And can you tell us, have you determined why that is?

A. Well, it is the sharp angle of the road and turn as you come right onto the crossing. You have to make a turn almost on the crossing. [384]

Q. That is, going over onto the other side?

A. Yes, to cross over.

Q. I see. Have you noticed anything, or did you notice anything prior to this time with respect to vegetation, the growth and brush along there?

A. Yes, there is a lot of brush growing in there.

(Testimony of Rena Everett.)

Q. I see. And there was and has been, or rather was, prior to the date of this accident?

A. Yes.

Q. I see. Now, on that date, did you hear the train at all, Mrs. Everett?

A. No, I didn't.

Q. In other words, you were in the house?

A. I was in the house.

Q. At all times? A. Uh-huh.

Q. Now, Erna Mac was a junior, was she, in high school? A. Yes.

Q. Can you tell us what the condition of her health was prior to her decease?

A. She was a good, healthy girl.

Q. She was a good, healthy girl? A. Yes.

Q. And, likewise, can you tell us what her situation was with regard to her grades and progress in high school? [385]

A. Yes, she got good grades.

Q. And can you tell us, likewise, with respect to her activities in her high school classes?

A. Well, just then she was to start on a project of making a spring wardrobe in some of the classes at school.

Q. Part of the domestic science courses?

A. I expect that is it.

Q. Would you say that she had some considerable ability in that regard?

A. Yes, she did, she sewed nicely.

Q. Now, with respect to her assistance about the

(Testimony of Rena Everett.)

home, that is, with regard to you and to Mr. Everett?

A. She helped her dad an especial lot. Of course, we have a small house and there isn't so much work in the house to do, but she always did her part, too, in the house, but she specially helped her dad, she liked to be out.

Q. I see. Now, I might ask you, too, what work that she did do around the house, what was she capable of doing?

A. Most any of the house work.

Q. And with regard to the work that she did with her father, Mr. Everett?

A. Well, she run the tractor, she plowed, and she helped him put up hay.

Q. You say that she operated the tractor? [386]

A. Yes.

Q. Did she operate it capably and efficiently?

A. Well, we thought so.

Q. You thought so. She could handle that mechanical device? A. Yes.

Q. And was it necessary, Mrs. Everett, in the position, that is, of you and of Mr. Everett and your family, that she did help out?

A. Yes, it was, he had to work, too, besides the place.

Q. In other words, do you own the place entirely yet? A. No, we are still paying for it.

Q. Beg your pardon?

A. We are still paying on it.

Q. You are still paying for it? A. Yes.

(Testimony of Rena Everett.)

Q. And you, as Mr. Everett said, have some sheep? A. Yes.

Q. And some pastureage, is that correct?

A. Yes.

Q. And he works at the mill? A. Yes.

Q. There in Ellensburg, is that correct?

A. Yes.

Q. And did Erna Mae, during the summer, the summer [387] previous, did she help with the work, that is, the farm work?

A. Yes, she plowed the whole lower field.

Q. The whole field? A. Yes.

Q. Did she also help with the chores?

A. Yes.

Q. And that was true the year before and up until the time of her decease?

A. That was the year before; that is, that spring we hadn't started in the spring work yet.

Q. You hadn't started the spring work?

A. No.

Q. Did she work, likewise, with her father on the farm during the summer? A. Yes.

Q. She did? A. Yes.

Q. And would you say she made a sizeable contribution by virtue of her labor?

A. Well, I would say so.

Q. You would say so.

Mr. Etter: I think that is all, Mrs. Everett.

Cross Examination

Q. (By Mr. McKevitt): Prior to coming to the

(Testimony of Rena Everett.)

Ellensburg vicinity, Mrs. Everett, you folks lived over in Kalispell? A. Yes.

Q. Flathead Valley? A. Yes.

Q. You know where the old West Side School is over there? I lived there about seven years.

A. Oh.

Q. Now, when you were living in Kalispell, was your husband engaged in farming operations?

A. We had 10 acres there.

Q. And on that 10 acres, did she do any work with the tractor or plowing, Erna Mae?

A. Yes.

Q. Over there?

A. And she helped a neighbor she worked for a neighbor there quite a bit, and during haying time she drove his tractor.

Q. It wouldn't take very long, though, to plow the 10 acres, would it?

A. No, no, not that.

Q. And how much acreage do you cultivate and plow down there on this 80-acre tract? [389]

A. Out where we are now?

Q. Yes? A. Not any since.

Q. Well, let's see, you went there in the fall, November of 1950?

A. Yes. Well, they estimated it was 30 acres. around 30 acres, she had plowed in that lower field in the spring of '51.

Q. Did she plow those 30 acres, then, in '51 sometime? A. Yes.

Q. And how long did it take her to do that?

(Testimony of Rena Everett.)

A. Well, she had her spring vacation from school and about Easter time, I think.

Q. I was just wondering how long it takes to plow 30 acres. I don't know.

A. Well, I wouldn't remember just how long she was at it.

Q. Well, would she work steadily? Could she do it in a day's time, two days, or what?

A. I don't know. She was more than one day, of course, I know that, but exactly how many days she worked on it, I don't remember.

Q. She didn't do any plowing to use the tractor in '52, did she? A. She may have.

Q. She met her death on the 8th of March.

A. She was driving the tractor that morning.

Q. On that morning. Well, in driving the tractor, what was she doing particularly?

A. Well, she was driving the tractor dragging a drag behind it to level up the road.

Q. Oh, I see.

A. Her father was riding on it.

Q. Now, the day of this accident was Saturday, is that correct? A. Yes.

Q. And she had a special reason for going to the mail box to procure some dress patterns?

A. Yes.

Q. And how often was that mail delivered out there on that rural delivery proposition?

A. Every day except Sunday.

Q. What was the practice in your family prior

(Testimony of Rena Everett.)

to March 8, 1952 of going after the mail? How frequently would you——

A. Mr. Everett usually stopped by the mail box on his way home from work.

Q. Pardon me?

A. Mr. Everett usually stopped at the mail box on his way home from work and would bring the mail home during the week days while he was working. [391]

Q. Well, how many occasions prior to this date had Erna Mae taken that truck and driven over that crossing to get the mail?

A. Well, I wouldn't know exactly how many. Several times. Not that spring, that was the first day since in December that she had drove.

Q. The last time she drove that truck prior to the date of her death was when?

A. Was in December, I think, sometime.

Q. Of 1951? A. Yes.

Q. And where did she drive the truck to on that occasion?

A. Up for the mail. She never drove it any place else.

Q. Then, she hadn't driven the truck in between that interval at any place, at any time, did she? Your answer is "no"?

A. Yes, that is what I said, no.

Q. So she had had very little experience prior to her death in operating that truck over that crossing; that is true, isn't it?

(Testimony of Rena Everett.)

A. Well, she had driven over it several times the fall before.

Q. Well, several times, you mean by that what? Would it be four or five?

A. Oh, more than that. I wouldn't know. [392]

Q. Would you say, in the whole period of time that you lived there from November, 1950, to March 8, 1952, that she had driven that truck over that crossing 25 times, that many?

A. Oh, yes, I would say at least that many times.

Q. Going to get the mail only on each occasion?

A. Yes.

Q. And in different months?

A. Yes.

Q. Do you think that she drove that truck over that crossing to get the mail in March of 1951?

A. No, she didn't.

Q. On any occasion prior to going over the crossing on that date, do you know whether she ever had an experience where she stalled the truck on that crossing?

A. No, I don't believe she ever did. We certainly never knew of it.

Q. Did she advise you that she wanted to take the truck and go over and get the mail?

A. Yes, she did.

Q. And she asked her father's permission and yours? A. Yes, she did.

Q. And did you hear her father, as he testified yesterday, tell her to watch out for trains?

(Testimony of Rena Everett.)

A. I didn't hear him, I was inside the house. I didn't [393] hear what their conversation was at all.

Q. Well, on previous occasions, I assume that you, yourself, when she would take that truck to go over that crossing, would tell her to watch out for trains? A. Yes.

Q. Because you knew it was the 'main line of the Northern Pacific? A. Yes.

Q. And many passenger or freight trains pass over it each day of the week, day and night; isn't that true? A. Yes.

Q. Now, I believe you testified that you went over that crossing in that truck, was it the day before, Friday? A. Yes.

Q. Who was driving it on that occasion?

A. My husband.

Q. Was Erna Mae in the truck?

A. No, she wasn't.

Q. Going over it the day before, the crossing was in about the same condition as it was on the 8th?

A. Yes.

Q. Did you have any difficulty going over it on Friday, the 7th? A. Well——

Q. Huh? [394]

A. We always—my husband always shifted down to go over it.

Q. Yes. Well, whatever depression there was in the crossing on the 7th, you got over the crossing without any difficulty after shifting gears, didn't you? A. Yes.

Q. Now, I believe it was your testimony, Mrs.

(Testimony of Rena Everett.)

Everett, that because of the curve in the roadway approaching the crossing, that you can't see the Milwaukee viaduct until you are almost on the crossing; is that your testimony?

A. That's right, from the driver's seat.

Q. And that is because of the angle?

A. Yes.

Q. Well, supposing that this is the railroad track here running east and west, which it does, this jury rail does, and she is approaching in this direction, of course, if she were approaching it at direct right angles, how far from the crossing would the front end of the truck be before she could see clear up to that viaduct?

A. If she was in a direct line, which she isn't on that road——

Q. But assuming that she was in direct line with it and the front end of the truck is 25 feet, we'll say, from [395] the crossing, under those conditions, she would be able to see clear up to the viaduct and beyond, wouldn't she?

A. Well, I never measured it, I couldn't say.

Q. But your testimony is based on this situation: Instead of facing in that direction, was she facing about like this (indicating), the track running in that direction?

A. Or even more to the side.

Q. Like this (indicating)?

A. Yes, more like that.

Q. Well, you can't get me around too far, you will have the road parallel with the track now.

(Testimony of Rena Everett.)

A. Well, it is, almost.

Q. Well, you don't mean to say, leave the jury under the impression, when she approaches that crossing, that she is 25 feet from it, that her back is toward this train?

A. As you come up on that crossing from our road up there, you are looking almost up the track to the west.

Q. Well, take on the occasion when you and your husband drove over it on Friday, as he drove up there, when he got the front end of his truck 20 feet from the track, if he had turned his head just in that direction, he would have a view up the track, just a half turn of the head; isn't that all that is required?

A. I would say you would have to be closer than that. [396]

Q. Well, I will show you, then, the Defendant's Exhibit 25, Mrs. Everett——

The Clerk: That is the wrong number, Mr. McKevitt.

The Court: 30.

Mr. McKevitt: 30. I looked at the camera number.

Q. This is a series of 1, 2, 3, 4 photographs, put together in what we call a panoramic view, Mrs. Everett. Now, your counsel has agreed that these pictures were taken two days after the accident, which would be on the Monday following, or Tuesday, and the camera is in the center of the road on your side of the crossing and it is 25 feet, in

(Testimony of Rena Everett.)

other words, what the front end of the car would be, south of the crossing and facing east and north.

A. How far ahead of that camera—how far is this picture ahead of where the camera was setting at 25 feet?

Q. Well, the camera is setting 25 feet from the center of the crossing.

A. They don't start taking the picture right at your shutter, does it? Isn't it up ahead farther?

Q. It shows 25 feet of approach to the crossing.

A. You had a line marked down here or something.

Q. Well, let me ask you this question: Isn't that a fair representation of the conditions that existed on the day Erna met her unfortunate death? That is correct, [397] isn't it? A. Yes, yes.

Q. You notice this viaduct up here (indicating on exhibit) now, do you mean to say, looking at that picture, that one would have to get his car almost onto the crossing before you could see this viaduct?

A. You have to get almost up there, in the driver's seat, to see up to the viaduct. When you are in the driver's seat.

Q. Is that because of the shrubbery or because of the curve in the road?

A. It is—well, some of both.

Q. Well, where do you see any shrubbery in here that would hide a train? A. No.

Q. A Diesel engine, huh? A. No.

Mr. McKevitt: I believe that is all, your Honor.

(Testimony of Rena Everett.)

Redirect Examination

Q. (By Mr. Etter): Mrs. Everett, looking at Defendant's exhibit again, this panoramic picture, you understand the panoramic picture, as counsel says, is a series of four pictures? A. Yes.

Q. In other words, of the series where the focus of the camera is looking straight ahead will only take in, say, No. 1, then by turning it to the right, No. 2, and by turning it further, No. 3, and by turning it further, No. 4; isn't that correct? Isn't that what you have to do? Isn't that what you have to do with your head or your neck, don't you have to turn it like this (indicating) because of the angle to see up what this picture shows by turning the camera? A. Yes.

Q. Plaintiff's 12, would you examine that for a moment? Is that a fairly accurate representation of the angle at which a car approaches, both with the angle of the railroad track and the angle of incline down the hill on grade? A. Yes, it is.

Q. Is that a fairly accurate representation?

A. Yes, it is.

Q. On No. 12. Now, these pictures that I have here are the Defendant's exhibits, Mrs. Everett. As you see, Plaintiff's Exhibit 21 and the little notation that defendant has, the camera is 350 feet east of the crossing facing west; in other words, looking at the Defendant's Exhibit 1, the chart, that picture would have been taken so that we can match the two here, that [399] picture would have been taken

(Testimony of Rena Everett.)

350 feet east of the crossing looking west. Do you follow me? A. Yes.

Q. In other words, they are all taken——

Mr. McKevitt: You are west or east of the crossing there?

Mr. Etter: That is what it says, east, up here (indicating on exhibit).

Mr. McKevitt: No, but where you are——

Mr. Etter: No, I am talking about this crossing.

Mr. McKevitt: Oh.

Mr. Etter: East of this crossing that I am pointing out here, the grade crossing where the accident occurred.

Q. I am speaking of those pictures. They are all taken east of this crossing looking west toward the crossing. Do you understand? A. Uh-huh.

Q. Now, the first one is 350 feet, correct?

A. That is what it says.

Q. It says up there. All right, will you take a look at the condition of the vegetation, shrubbery and foliage down by that crossing? Can you see it?

A. I can see the foliage and vegetation.

Q. Growing up along here, is that correct?

A. Yes. [400]

Q. All right.

The Court: Is that 21?

Mr. Etter: Yes.

The Court: Yes, all right.

Mr. Etter: 21. Counsel, I think you were going to stipulate with me the height of the crossing pole

(Testimony of Rena Everett.)

that appears on that crossing? Did you have it there?

Mr. McKevitt: Yes. Sawbuck sign, you mean, Max?

Mr. Etter: Yes, the sawbuck sign.

Mr. McKevitt: In other words, what you are referring to is this drawing on the map right here (indicating)?

Mr. Etter: Yes, one of these sawbuck crossings.

Mr. McKevitt: Can we mark that "Sawbuck Crossing?"

Mr. Etter: Mark it anything so we know what it is. That is what it is, or crossarm, probably.

Mr. McKevitt: Put "Crossing Sign."

Mr. Etter: "Crossing Sign."

(Whereupon, the said designation was placed upon Exhibit 1 by Mr. McKevitt.)

Mr. McKevitt: Now, the dimensions of that, I believe you agreed we would stipulate.

Mr. Etter: Yes.

Mr. McKevitt: That it is 12 feet high. I am not referring to the crossarms on it. 12 feet high. And it is [401] 12½ feet from the center of the track, and it is 18 feet from the crossing measured along the rail.

Mr. Etter: That is correct.

Q. You see the crossing on which we have just stipulated as to height? A. Yes.

Q. 12 feet along there (indicating), and this picture was taken a couple of days after the acci-

(Testimony of Rena Everett.)

dent. Would that indicate the foliage pretty well?

A. Well, that is the way it was.

Q. That is the way it was. And here is a view 400 feet east of the crossing. I will ask you to take a look at the foliage on what is indicated up there as the south. That would be looking at the south side, that would be where a car approached.

Mr. McKevitt: Is this for the purpose, Mr. Etter, of having her testify those are fair representations as to foliage?

Mr. Etter: Yes.

Mr. McKevitt: Well, I have conceded them, I have put them in evidence.

Mr. Etter: They are your exhibits.

Mr. McKevitt: I have conceded all that because I offered them in evidence.

Mr. Etter: All right, I will put it in the record, [402] however.

Q. That one is taken 450 feet from the crossing. Would your answer be the same, that that is a fairly accurate representation of the foliage on the south side by the crossing? A. Yes.

The Court: That number is——

Mr. Etter: That number, your Honor, is 22.

The Court: 22, all right.

Q. (By Mr. Etter): Here is one, Defendant's Exhibit 19. That is where the camera is only 250 feet east of the crossing facing westward. Would the foliage as it appears there and the brush be approximately an accurate representation of what it was on that date? A. Yes.

(Testimony of Rena Everett.)

Q. And handing you Defendant's 20, where the camera is just 50 feet further east, or 300 feet east of the crossing, would that be a fairly accurate representation of the foliage and vegetation and brush as it appeared on the south side of the crossing?

A. Yes.

Q. And, again, Defendant's Exhibit No. 24, 500 feet east of the crossing, would that likewise be a fairly accurate representation of the brush and vegetation and otherwise appearing on the south side of the trackage [403] at the grade crossing?

A. Yes.

Mr. Etter: All right, that is all, Mrs. Everett.

Mr. McKevitt: That is all.

(Witness excused.)

The Court: I think it is a little late to call another witness.

Mr. Etter: I think it is late to call another witness. Mr. McKevitt and I, however, have stipulated, in the allegations in the addendum clause of the complaint there is a prayer for \$500.00 for the value of the 1940 panel Dodge delivery truck. We have made inquiries and ascertained that Blue Book and retail price of a Dodge panel delivery truck in 1952 of a 1940 model and find that it was \$300.00.

The Court: I see.

Mr. Etter: So we have stipulated, without calling a witness to that effect, that the value is \$300.00, rather than \$500.00 as alleged.

Is that correct, Mr. McKevitt?

Mr. McKevitt: I have no objection to the reduction, your Honor.

The Court: All right.

If counsel have no objection, I propose to recess [404] for two hours today, rather than the hour and a half. Recess until two, and then if you haven't finished the testimony by that time, continue until five tonight, instead of 4:30.

Very well, court will recess until two o'clock.

(Whereupon, the trial in the instant cause was recessed until two o'clock p.m., this date.)

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had, to-wit:)

The Court: Mr. Etter.

The Clerk: Your Honor, I am marking Plaintiff's Exhibit 33 for identification.

Mr. Etter: I was going to recall one of the witnesses to identify the picture, but Mr. McKevitt has seen it and he says it may go in without objection.

Mr. McKevitt: That is correct. [405]

The Court: All right.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 33.)

Mr. McKevitt: Do you want to explain to the jury what the picture is, Max?

Mr. Etter: Yes. Gentlemen of the jury, this is a picture of the front end of the Diesel and of the panel delivery truck a short time after the accident just before they pulled the truck away. I was just

going to show it to you, you will get it later. That is what it is when it stopped.

(Exhibit 33 handed to jury.)

Plaintiff rests, your Honor.

The Court: I will excuse the jury, then, while we have some matters taken up in your absence.

(Plaintiff rests.) [406]

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: I assume you would wish to make some motions, Mr. McKevitt.

Mr. McKevitt: Yes. May I, preliminarily thereto, inquire if your Honor feels it is sufficient to go to the jury? Personally, I do not, I otherwise would make extended argument on it, but I don't want to trespass upon your Honor's time if you are convinced in your own mind that there is sufficient to make us go forward. I don't think so. I await your Honor's pleasure in that regard.

The Court: Well, it was my view that there is enough to submit the case to the jury here, although I am very doubtful about some of these grounds of negligence, but, of course, my only problem now is to determine whether or not to direct a verdict for the defendant.

At the close of the case, if it goes forward, I think counsel should be prepared to discuss seriously to the Court these individual allegations of negligence and determine which ones should be submitted to the jury.

Mr. McKevitt: Very well, then, what I will do is make the formal motion at this time and your

Honor will rule on it, and then following that I will ask your Honor to withdraw certain allegations from the jury's consideration before going forward with our testimony, if that meets [407] with your Honor's approval. I think that is the practice we have indulged in before down here in a similar case. I believe it was the Dean case, if you recall.

The Court: Yes, I believe so. I am a little doubtful about that procedure. I think maybe that should come at the close of all the testimony.

What I have in mind here is, if the plaintiff hasn't made a *prima facie* case, of course, then the defendant is entitled to have the case end at the conclusion of the plaintiff's evidence and have the jury directed to return a verdict for the defendant. If, however, there is any substantial factual question, any substantial evidence to submit to the jury, it seems to me that about the only thing the Court can in propriety do is to deny the motion and direct that the case go forward, because I think that the plaintiff would have the right from your witnesses in your case to draw out facts that would support some of these other allegations, and if he does, why, he is in, whether it comes from your testimony or from his. I think that is the proper practice here.

For instance, if I instructed this jury that everything was withdrawn except blowing the whistle, we'll say, just using that by way of illustration, and then you put on witnesses and on cross-examination the plaintiff brings out there is negligence in other particulars, I [408] think that——

Mr. McKevitt: Oh, I see your point.

The Court: —he would have a right to have those issues go to the jury.

Mr. McKevitt: I will state the motion briefly and the reasons for it and await any motion to withdraw until the conclusion of all the testimony.

The Court: Yes, until the conclusion of all the testimony. That is what I had in mind.

Mr. McKevitt: Very well, your Honor.

The Court: Then I will seriously consider each one of them.

Mr. McKevitt: Very well.

The plaintiff having rested, the defendant Northern Pacific Railway Company now challenges the sufficiency of the evidence to support the material allegations of the complaint and moves the Court to instruct the jury to return a verdict in favor of the defendant railway company.

This motion is made and based upon the following grounds:

The allegations of negligence upon which the plaintiff relies for recovery in this instance are found beginning with Paragraph VI. In that paragraph, Subdivision (a), it is alleged that: [409]

“Defendants drove said train in a negligent, careless and reckless manner and at a speed between 70 and 80 miles per hour, which speed was excessive and dangerous to persons using said crossing at the time, place and under the conditions then existing.”

There is no testimony in this case that would support the allegation of this complaint that this train was going 70 miles an hour or any speed in excess of possibly 60 miles an hour. Furthermore,

with reference to the speed of that train, there has been no showing that there is any speed limit there, either by city ordinance or by state law, and neither has it been shown that any rule of the railway company enacted for the benefit of the traveling public was violated insofar as the speed of this train was concerned.

Subdivision (b) of Paragraph VI alleges that the defendant was negligent in that:

“Defendants failed and neglected to provide and maintain any signal, by mechanical device or otherwise, for the purpose of warning Erna Mae Everett and others of the approach of said passenger train.”

While it is true that there were no automatic signals at that crossing, it has not been shown that it was [410] the duty of the railway company to have installed such signals and, as a matter of fact, the installation of those signals and the necessity for them is something that is determined by the Public Service Commission of the State of Washington, acting in conjunction with the county commissioners of the particular county involved and with the railway company.

Subdivision (d) alleges that:

“Defendants neglected and failed to sound the crossing signals required by the statutes of the State of Washington as the locomotive approached the said crossing, by either blowing a whistle or sounding a bell of said locomotive.”

It is true that the evidence in this case from the standpoint of the plaintiff would leave the infer-

ence that this crossing signal did not commence at the whistling post 80 rods distant from the crossing as by law required. However, the Supreme Court of the State of Washington has held on many occasions that even though there had been a failure to give these crossing signals in any particular, yet, if from the physical facts it is apparent that the driver of the vehicle in question had a sufficient view along the track of the approach of that train, then the failure to accord the right of way to the railway company, [411] which it is entitled to under the law, was contributory negligence as a **matter of law**.

The evidence clearly shows in this case, with reference to that subdivision, that this girl was warned of the approach of this train for at least, under the testimony of the defendant, a distance of 635 feet, which I think is the distance—I believe we are agreed on that; it is subject to scale—from the underpass to the crossing, and that those signals, in and of themselves, were sufficient warning to her, because, accepting the testimony of the plaintiff, at a speed of 50 miles per hour, would mean that that train was traveling 75 feet per second, which would mean that at least she had eight to ten seconds warning of the approach of that train. And the evidence further shows that she was given sufficient warning of the approach of that train to enable her to open the door of the panel truck, close the door of the panel truck, and take three or four steps in a direction away from the approaching train before the truck was struck.

With reference to Subdivision (e) of Paragraph VI, namely, that:

“Defendants negligently failed to stop said train, slacken its speed, or give timely or adequate warning of its approach to said crossing when the persons [412] operating the said train saw, or, by the exercise of ordinary care, would have seen, Erna Mae Everett and plaintiff’s panel truck in a position of imminent peril of being struck by the said train;” as the defendant construes that allegation, it is an attempt to invoke, at least in part, the doctrine of last clear chance, and, of course, there is no evidence which would justify the Court in submitting to the jury the issue of last clear chance, because, as your Honor well knows, and from the decisions of the Supreme Court, of which you were a member, the determination of whether the last clear chance doctrine applies is a question of law for the Court to determine in the first instance.

There is no testimony here of a probative value that the speed of this train wasn’t slackened, and, even accepting the testimony of Mr. O’Neill and his son that they didn’t see anything or indicate anything that the speed of the train was slackened, the only purpose for taking a position of that character by the plaintiff would be that, had the speed of the train been slackened at a certain point where the engineer saw this position of peril, that it would have given this girl an additional interval of time within which to get out of the position in which she placed herself. Now, clearly, under the evidence in this case. [413] that would require expert testi-

mony as to by a certain brake application at a given point, this train could have been slowed down from a rate of speed, we'll say, taking their figure, 50 miles an hour, to whatever it would be—I don't know—45 or 50 or 30, and then you have to consider the time interval, which is undoubtedly what they have in mind in this case, and, of course, under the present state of the record, it is just purely speculative.

With reference to Subdivision (f) of Paragraph VI, the contention is made that:

“Defendants negligently maintained said crossing area and right-of-way by failing to cut the natural growth, underbrush and vegetation on its right-of-way near said crossing, with the result that said natural growth of underbrush and vegetation obstructed the view of defendant railway company's tracks from persons driving upon O'Neill Road and approaching said crossing from the southerly direction.”

I address my argument with reference to that allegation on several grounds, and the first ground that I call to your Honor's attention is that when we speak of the right of way of this defendant, there isn't a scintilla of [414] evidence in here to show how wide that right of way was at that point at that time, whether it was 10 feet or 15 feet or 200 feet, and, of course, it isn't incumbent upon the railway company to maintain that county road. It is incumbent to keep our right of way, as such, in a safe condition. But so far as the record here is concerned, your Honor doesn't know the width of

that right of way at that time because no witness was interrogated in that regard.

And, furthermore, and apart from that objection to that allegation, the defendant insists that under the photographs introduced here in evidence, and which are physical facts that speak louder than words, it cannot be urged that that right of way in that vicinity was so covered with brush as to obscure the approach of this train. There isn't any testimony as to how high the brush was. There is some testimony to the effect that, well, you couldn't see that train until you practically got on the crossing. Well, that is tied in not only with the brush area, so-called, but the curvature of that road. Well, the grade of that road and its curvature, whether it is good, bad, indifferent, or dangerous, is something that is the fault of Kittitas County and not the Northern Pacific Railway. No showing here that we were supposed to maintain any portion of that area there except the area that is covered by the planking on the outside of each rail, and that is where our duty [415] began and ended.

Subdivision (g) is that:

“Defendants negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to said crossing and immediately next to the wooden planking at said crossing.”

Well, I have already said that it is not our duty to maintain the roadway leading up to the crossing. With reference to the contention “immediately next to the wooden planking,” it is assumed there is

merit in that, but what evidence here is there that would in any wise justify submitting that planking condition to the jury as a possible proximate cause, when there is an utter absence of evidence from any source as to whether or not that planking condition had anything to do with this truck stalling? There isn't anyone that has seen this truck approaching that crossing and there isn't anyone that knows how long it was on the crossing and, consequently, there is no evidence to the effect that the drop between the planking and the road surface had anything to do with this truck stalling.

Referring now to Paragraph VII, in the preliminary, prefatory portion of that paragraph it is said that this defendant was guilty of wanton misconduct—wanton misconduct—on the part of the defendants in the operation [416] of the train in the following particulars:

“(a) The defendant's servants on said train intentionally, and with a reckless indifference to injurious consequences probable to result therefrom, drove said train at a speed between 70 and 80 miles per hour, which speed was greatly excessive and dangerous to persons using said crossing at the time and place under the conditions then existing.”

Well, of course, your Honor knows there is no testimony of that speed at all or that speed such as has been testified to was a wanton, reckless and dangerous rate of speed. This is the main line of the Northern Pacific Railway Company; this was a passenger train.

“(b) Defendant's servants operating said train,

saw, or should have seen, that an unusually dangerous situation existed when plaintiff's vehicle, operated by Erna Mae Everett, stalled on said railroad track and said Erna Mae Everett was attempting to abandon and flee said vehicle. Yet, knowing that a failure to warn Erna Mae Everett would probably result in serious injury, the defendants proceeded to run [417] said train into said intersection and against plaintiff's said vehicle without previously giving any signal or warning by blowing the whistle or ringing the bell of the locomotive, or giving warning by way of any other device of any kind whatsoever."

Well, suffice it to say there isn't any evidence of any kind or character to support that allegation. The only evidence in this case as to what existed there was the testimony of this engineer, Mr. Sco-bee, and, as I recall his testimony, it was this, and it is the only evidence touching the approach of the vehicle to the crossing, that some distance east of that crossing, I believe he said 2 or 300 feet, he wasn't exact, he says, "I can't pin point it," but let's assume that it was a thousand feet from the crossing, giving them the benefit of that, or 1,200 feet from the crossing, when he first saw this vehicle approaching that track, whether it was 25 miles per hour; there is no evidence in here that if he saw it at that time or should have seen it at that time, 1,200 feet, that this truck was in a perilous condition of any kind or character; and, as a matter of fact, he says it was going 25 miles an hour and came to a stop and then began bucking

forward, and, of course, his train is moving all the time and no showing of [418] any kind that had he dynamited that train at any particular point, that it would have aided this girl to escape from the predicament into which she placed and found herself.

Subdivision (c):

“Defendants saw, or should have seen, that a collision with Erna Mae Everett was imminent and had the opportunity to realize and appreciate her danger, but the defendants, with reckless indifference to injurious consequences probable to result therefrom, failed to reduce the speed of said passenger train by applying full and sufficient braking power to the wheels of said locomotive and the cars following it.”

That is the last clear chance doctrine, if I correctly interpret that language, and I won't discuss that any further except to reiterate there is no evidence here that would justify the submission of the last clear chance doctrine.

Subdivision (d):

“Defendants wantonly maintained the said crossing in a dangerous condition in that at said time and place the rock and cinder ballast leading up to said railroad crossing and next to the wooden planking at [419] said crossing had been worn or carried away causing the wooden planking to protrude like a barrier above the roadway in an unusual and hazardous manner, and as a result of the foregoing dangerous conditions, plaintiff's vehicle became stalled on said crossing in the path of defendant's train.”

No evidence to support that. No one has testified or given any testimony that would enable this jury to determine, yes, that planking condition had something to do with the stalling of this truck.

The defendant Northern Pacific Railway Company contends that by virtue of the knowledge of this girl of the existence of that crossing and by virtue of the fact that she knew she was approaching a railroad crossing on the main line of the Northern Pacific, by virtue of the fact that she had been warned by her father to watch out for trains; yet, disregarding her knowledge of the crossing conditions and apparently disregarding the admonition and caution given by her father, she got this truck onto that crossing and in some manner stalled it, and it is the contention of the railway company that that was contributory negligence on her part as a matter of law, barring the recovery.

It is also the further contention of the railway [420] company that the father was negligent in two particulars; namely, in permitting this girl to drive this car without a license, and, secondly and apart from that, to permit this girl to drive a truck in the condition that that truck was in and with what now appears to be considerable unfamiliarity with it, because she hadn't driven it since December preceding the accident, and because of the father's knowledge of the many trains that operated over this crossing and its condition, that apart from any license feature, it was negligence to have permitted the girl to have driven the truck under those conditions.

The Court: Well, as I indicated at the outset, I will deny the motions at this time, with the understanding, of course, that the Court will consider the individual grounds of negligence at the conclusion of all the evidence.

Mr. McKevitt: Very well, your Honor.

May I make inquiry at this time if your Honor feels that there is sufficient evidence here to submit the case to the jury on the doctrine of last clear chance? Is that a fair question?

The Court: I haven't definitely made up my mind on that point.

Mr. McKevitt: Very well, I wanted to know if there is some question in your Honor's mind. If you would tell [421] me that you didn't think so, then I wouldn't put on an expert. If you are not clear about it, I will put him on, as long as I have him here.

The Court: I, frankly, am inclined to do so. I quite agree with you, Mr. McKevitt, I see your point and your position here. Ordinarily, I think, expert evidence would be necessary to show whether it would be possible to stop, but here, of course, we have a situation, as I recall, where the engineer testified that he saw the girl on the track about the time he came through the underpass.

Mr. McKevitt: That's right.

The Court: And then we have the testimony of these O'Neills that the girl was just a half a step from safety when the train hit her. She was almost there, they thought she was there. And I think that, aside from any expert testimony, that the jury could

draw a reasonable inference that had that train been dynamited at the time the engineer first saw her on the track, it would have given her another step and her safety from that situation, so that I think it raises the question there where the jury could draw the inference.

Mr. McKevitt: I am glad to have your Honor's pronouncement in that regard, because if your Honor felt there wasn't sufficient grounds to go to the jury on the last clear chance doctrine and I put an expert on, I might, [422] through cross-examination, be made to appear——

The Court: I see your position, you are entitled to know my thoughts on that, and that is my attitude at the present time.

Mr. McKevitt: Thank you.

The Court: All right, bring in the jury.

(Whereupon, the following proceedings were had in the presence of the jury:)

Mr. McKevitt: May it please your Honor, in view of the fact, if it pleases the Court and gentlemen of the jury, that with one exception the witnesses subpoenaed by the defendant to appear at this case have already been called by the plaintiff, I see no necessity for making an opening statement, except to advise the Court that we have one additional witness that wasn't called, Mrs. Nurre, with reference to whistle signals and then we might recall the engineer for one or two questions, then our expert.

The Court: All right.

Mr. McKevitt: Mrs. Nurre, will you come forward? [423]

EVELYN NURRE

called and sworn as a witness on behalf of the defendant, was examined and testified as follows:

Direct Examination

Q. (By Mr. McKevitt): Will you state your name to the Court and jury, and, Mrs. Nurre, you have heard us telling the other witnesses to keep their voices up?

A. Mrs. Evelyn Nurre.

Q. And where do you reside?

A. Ellensburg.

Q. And are you married? A. Yes.

Q. And children? A. Four.

Q. Husband living? A. Yes.

Q. What are you doing, taking care of the children? A. Yes.

Q. Were you living in the vicinity of Ellensburg on March 8, 1952? A. Yes.

Q. You have had occasion to examine this map or, at least, an exact copy of it in my office, have you not? [426] A. Yes.

Q. When I was discussing with you what you knew about this case, if anything? A. Yes.

Q. Your answer is——? A. Yes.

Q. Now, are you able to come down and indicate to the Court, counsel and the jury where your home was on March 8, 1952? A. Move down?

(Testimony of Evelyn Nurre.)

Q. Yes, please.

(Witness goes to Exhibit 1.)

A. Down this road.

Q. Now, when you say "down this road," we will call that Nurre Road, then, is that right, for identification? Nurre Road. In other words, if you were going to Ellensburg from out to your place, you travel this road (indicating)?

A. Yes.

Q. Now, how far is your home located from this crossing? A. About a half a mile.

Q. Half a mile. You can't see the crossing from your home, can you? A. No.

Q. You are a half a mile in what direction, now? You have [427] in mind this direction, see, this is north that way (indicating)?

A. Well, my road goes right along the Milwaukee for half a mile and then turns into my yard.

Q. You say it is a half mile?

A. About half a mile.

Q. All right, now, I think you may take your seat, Mrs. Nurre.

Do you have a farm or ranch, or is it a home, or what? A. Small dairy farm.

Q. Small dairy farm? A. It was.

Q. Are you living at the same place now that you lived on March 8th, '52? A. Yes.

Q. And how long before March of 1952 did you live there?

A. Well, it will be seven years this April.

(Testimony of Evelyn Nurre.)

Q. So you have lived there, then, about five years before the accident? A. About.

Q. Four or five, anyway? A. Four.

Q. And have you had occasion, I assume you have, to go over that crossing? [428] A. Yes.

Q. Many times before this accident?

A. Yes.

Q. In the car? A. Yes.

Q. And you are familiar with the fact that this is the main line of the Northern Pacific?

A. Yes.

Q. Now, where were you on the date of this accident? A. In my yard.

Q. By the way, at that time were you acquainted with Mr. and Mrs. Everett?

A. Very slightly.

Q. You knew who they were?

A. Yes, by sight.

Q. You know that they had this lovely young daughter Erna? A. Yes.

Q. Was your attention in any manner directed to anything unusual up at that crossing? You can answer that yes or no. A. Yes.

Q. And what attracted your attention?

A. The noise, the tooting of the train.

Q. Of this passenger train? A. Yes. [429]

Q. Now, just tell the Court and jury generally what whistle signals, if any, you heard on that date.

A. It wasn't exactly a signal, it was just a screaming of the whistle.

(Testimony of Evelyn Nurre.)

Q. And is that what caused you to go up to the crossing?

A. I went up on the Milwaukee first to look and see what the trouble was.

Q. Well, you heard these whistle signals on dates prior to this accident? A. Yes.

Q. These whistle signals that you heard on that date, were they the same or partly the same and partly different from what you ordinarily heard in the past?

A. I don't remember whether I heard the regular whistle for a crossing. I heard the unusual whistling, what drew my attention was the unusual whistling.

Q. And describe that.

A. Well, it was just a series of whistles, not like their usual signal. It was several whistles, I don't know how many.

Q. Plainly audible to you, were they?

A. Very plainly.

Q. I assume you don't know the location of the train when you heard these whistles, do you?

A. No. [430]

Q. Did you go up to the scene of the accident?

A. Yes.

Q. Did you go up to the crossing itself?

A. We drove out our lane and down that other lane that goes west. We didn't go across the crossing.

Q. You didn't go across the crossing?

A. No.

(Testimony of Evelyn Nurre.)

Q. Well, did you go up to the front end of the train or any portion of it?

A. Yes, drove up to the front end.

Q. I assume that by the time you got there, her body had been removed, had it? A. Yes.

Q. Have you driven an automobile over that crossing prior to this time? A. Yes.

Q. With reference to March 8, 1952, had you driven it over immediately prior to that time, the car? A. I'm not sure.

Q. Whether you drove an automobile over it before March of 1952?

A. I most undoubtedly drove it early that year, but I don't remember just how soon before the accident.

Q. Oh, you don't recall when you may have gone over it before the date of the accident? [431]

A. No.

Q. When you have to go to Ellensburg, you have to go over this crossing, do you not? A. Yes.

Q. Well, can you tell me approximately from the average, we'll say, whether it is once a week or more or less, that you go over that crossing prior to March 8, 1952?

A. On an average, I go over about once a day, but that isn't clear to Ellensburg, just either to the highway, to the school bus.

Q. Well, that is what I am talking about. You average once a day going over that crossing prior to March 8, '52? A. Yes.

Q. What would be the reason for that?

(Testimony of Evelyn Nurre.)

A. Taking my children to the school bus or picking them up at night or the mail box.

Q. Oh, I see. Well, then, is it reasonable to assume that you might have been over that crossing the day before the accident, which was a Friday?

A. It is possible.

Q. Were your children going to school at that time? A. Yes.

Q. What have you to say, based on your knowledge of the conditions of that crossing and your travel over it, [432] what have you to say as to its travel condition, whether it was difficult to negotiate or hard to negotiate or easy to negotiate, or what?

Mr. Etter: I will object to that. She can describe the condition of the crossing. I think it is up to the jury to determine otherwise, your Honor.

The Court: Yes, I think she should describe the condition.

Q. (By Mr. McKevitt): All right, you describe the condition of the crossing as your recollection of it was immediately before this accident, **having in** mind, now, the planking area between the rails and the planking on either side of the rails on the outside?

A. Well, I never took a close look at it to know just how much dirt was away from the planks, but, in my opinion, I don't consider it a good crossing and I don't consider it a really bad crossing. It is just an average crossing.

Q. An average country crossing, is that what you would call it?

(Testimony of Evelyn Nurre.)

A. That is what I would call it.

Q. Did you go up to the crossing where these people were congregated, this group that we were talking about, Mrs. Nurre? A. No. [433]

Mr. McKevitt: You may examine.

Cross Examination

Q. (By Mr. Etter): Mrs. Nurre, you undoubtedly drove over the crossing at different times, as I gather from your testimony? A. Yes.

Q. That is, before March the 8th. At that time, that is, prior to March the 8th, Mr. Nurre was using the car in his work, wasn't he?

A. We have a truck and a car.

Q. Oh, I see.

A. And when I need the car, I have the car and he takes his truck.

Q. I see.

A. But he don't hold a steady job.

Q. I see. I was talking about just before March the 8th of 1952. Did you have both of those cars then? A. Well, we drove up in our car.

Q. Beg your pardon?

A. We had our car at the house that day.

Q. Yes. Well, I mean prior to March the 8th of 1952, for some months prior, did you have both the car and another vehicle? I'm not talking about now, I'm talking about back then? [434]

A. You mean have we always had those two?

Q. Yes?

A. From the time we moved on the place.

(Testimony of Evelyn Nurre.)

Q. And you have always had the two and used them? A. We have a truck and car.

Q. And used them? A. And used them.

Q. Fine. Now, the approach that you make to the crossing is from a different directional approach than that made on the highway that constitutes—or the road that runs past the Everett house and the Klocke house, is that right? A. Yes.

Q. And am I correct in saying that as you come down to go across the crossing, your approach as you come onto the crossing is almost a direct right angle approach?

A. Right straight to the crossing? No, it is this way (indicating).

Q. Beg pardon?

A. You slant this way, like they slant that way, to the railroad crossing.

Q. When you come onto the crossing?

A. Yes.

Q. In other words, you drive on the right side of the crossing, is that correct? [435]

A. It comes up to the crossing at a slant.

Q. This scale as it is marked here, Mrs. Nurre, is indicated 20 feet to the inch, and when you come up on the right side of the highway, do you go across it at a slant, or do you go across it more straight than coming up around this way (indicating)?

A. I would say I go across at a little slant.

Q. A little slant, but what I am getting at, you

(Testimony of Evelyn Nurre.)

drive on the right side of your highway, is that correct, on the right side of this highway?

A. Right side of my lane?

Q. Yes, you drive in your right lane, do you not?

A. There is only—it is only one car width.

Q. Yes. And when you come up to the crossing thuswise, you have an area——

A. Not that much of an area, no.

Q. Beg your pardon? You don't have that much of an area? A. No.

Q. Well, this road that comes up from the Everetts, is that the same width as your road?

A. Ours is smaller.

Q. Yours is smaller. About half as large, would you say? A. Yes, it is a private lane.

Q. It is a private lane. But you don't think there is this much room up here as you come onto the crossing? [436]

A. No, not enough to get up on the tracks, straight to the tracks, no.

Q. I see. Does your car come on there at the same angle as the Everett car? I mean, the opposite way, but about the same degree of angle?

A. I wouldn't say it was quite as much of a slant as theirs.

Q. Not quite as much, is that right?

A. No, I don't think so.

Q. And isn't it a fact now that there is a new portion of highway, following my finger (indicating), that has been built this way and down that way? A. Yes.

(Testimony of Evelyn Nurre.)

Q. Is that correct? A. Yes.

Q. Showing you this exhibit, which is the Defendant's Exhibit marked 31, Mrs. Nurre, will you examine that for a moment, please?

Is that a fairly accurate representation of the crossing area? A. Yes.

Q. And could you tell me there about where it would appear on the first picture of the panoramic view, where your road comes into that?

A. Right here (indicating). [437]

Q. Beg your pardon? A. Right there.

Q. Is that where your road comes in?

A. Uh-huh.

Q. And turns onto the crossing?

A. Yes, right straight up right there to the crossing.

Q. All right, thank you. In other words, it is that open space just beyond the telephone pole that appears on the left? A. Yes.

Q. Now, showing you the Defendant's Exhibit No. 30, Mrs. Nurre, just examine it for just a moment so you can acquaint yourself with the view. It is a panoramic view, see. A. Uh-huh.

Q. Coming from the crossing in this direction up to the overpass.

Could you tell me whether you see any portion there of the road that goes toward your place?

A. This one right here (indicating).

Q. That one right there. In other words, that is off to the far left, is it not, of the first panoramic picture on Exhibit 30? A. Yes.

(Testimony of Evelyn Nurre.)

Q. This is Exhibit 30. [438]

A. There is two roads.

Q. There is two roads, one of them goes directly parallel to the railroad track and the other one goes back in the direction indicated on the chart?

A. Yes.

Q. That's fine. Now, do you notice in this picture the condition of the planking and the roadway over to the right side of the picture? A. Yes.

Q. Is there some difference between that and the condition over on the other side where you come onto the highway? A. Yes.

Q. And what is the difference, if you will tell the jury?

A. The gravel has been knocked away from this side.

Q. From that side. And over on this side?

A. It is practically level.

Q. It is practically grade level?

A. Uh-huh.

Q. That is the approach that you have?

A. Yes.

Q. Isn't that correct? A. Yes.

Mr. Etter: That is all, thank you. [439]

Redirect Examination

Q. (By Mr. McKevitt): The knocking away of that gravel, state whether or not it is a fact that at that time of year, trucks going over there will continually break that gravel down; isn't that correct? A. Yes.

(Testimony of Evelyn Nurre.)

Mr. McKevitt: That is all.

The Court: Any other questions?

Mr. Etter: No questions, your Honor.

Mr. McKevitt: Can Mrs. Nurre be excused?

Mr. Etter: Yes.

(Witness excused.)

Mr. McKevitt: I would like to call Mr. Scobee for a few questions.

FRANCIS WILLIAM SCOBEE

called as a witness on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. McKevitt): You are the engineer who was in charge of this train on that date and you have already been sworn to testify? [440]

A. Yes, sir.

Q. Mr. Scobee, you observed Mr. Everett in the courtroom and do you recall him now? Do you recall seeing that gentleman on the day of this accident immediately following? A. Yes, sir.

Q. Keep your voice up, please. A. Yes.

Q. Where? A. Right after the accident.

Q. And did you have a conversation with him?

A. Yes, he mentioned something and I seen somebody nod their head to me and he come over and started talking to me.

Q. What was the conversation?

A. Well, the first thing he did, he said——

(Testimony of Francis William Scobee.)

Mr. Connelly: May I interrupt and ask who the conversation was with?

Mr. McKevitt: Mr. Everett.

A. Mr. Everett.

Mr. Connelly: Thank you.

A. Mr. Everett said, to my best recollection, at that time, "I told her, 'Watch out for that passenger train;' that it hadn't come yet when she asked me to use the truck." And he says, "Then shortly afterwards," [441] he says: "I heard the train whistle," then he says, "short blasts," and he says, "That is when I knew there was something wrong."

Q. (By Mr. McKevitt): Now, in connection with the latter statement, did he state anything as to what experience he had had in the past with hearing whistle signals of that character or something like that?

A. Well, something about—now it is a little vague—but he said, mentioned something about short blasts of a whistle was a kind of warning that farmers had had that livestock or something on the track. It was something to that effect.

Q. Well, was his attitude toward you on that date one which in any wise indicated that he felt that you had done something you shouldn't have done or failed to do something you should have done?

Mr. Etter: Object to that.

The Court: Sustain the objection to that as to what his attitude was.

Q. (By Mr. McKevitt): Did he ask you at that

(Testimony of Francis William Scobee.)

time as to whether or not you had sounded the whistle signals?

Mr. Etter: Just a minute, I am going to object. They are all leading. If counsel wants to ask about a conversation, that's all right. I will object on that ground. If he wants to talk about a conversation, that's fine. [442]

The Court: Yes, I think you should ask what his conversation was.

Q. (By Mr. McKevitt): Well, have you covered now in its entirety, so far as you recall, the conversation you had with Mr. Everett?

A. That is about it, yes.

Q. All right.

A. As far as I can remember.

Q. Now, I believe you testified yesterday as to your previous experience in operating a passenger train over that area? A. Yes, sir.

Q. And how many times did you say you had operated this same train over that area before the accident?

A. Well, this specific train about 12 or 15 times, something like that.

Q. As an engineer? A. Yes, sir.

Q. Had you ever been on it in the capacity of a fireman? A. Yes.

Q. And over what period of time?

A. This specific train, I fired that passenger job for about a year.

Q. About a year prior to the accident?

A. Prior to my engineer's seniority. Oh, it is

(Testimony of Francis William Scobee.)

about a [443] year. Sometimes it varies and you catch them jobs off the extra board, too, as a fireman.

Q. When you speak of the extra board, you are referring now to what is connected with seniority in railroad?

A. That's right. The younger you are in your capacity as a fireman or engineer, you work the extra board. You haven't the seniority to hold a regular job, in other words.

Q. The younger you are, the more you get bumped by an older engineer in point of seniority, is that what you mean? A. That's right.

Q. Now, for the purpose of defendant's case, when, if at all, did you begin sounding of the whistle as you approached that crossing?

A. Immediately at the whistle post or close thereafter.

Q. And the whistle post is shown in some of these photographs here in evidence, is it not?

A. Yes, it is.

Q. And what was the standard crossing whistle used by the Northern Pacific Railway Company at that time and prior thereto?

A. Over all crossings, it is two longs, a short and a long, and the long blast will be carried over the crossing. [444]

Q. The last long blast has to be carried over the crossing? A. That's right.

Q. Now, what portion of that signal did you give on that date?

(Testimony of Francis William Scobee.)

A. I only got to sound two whistles that I can recall, and that was immediately after passing the whistle post. I sounded one long whistle, then a small pause, and then another long whistle, and then this truck, the top of this truck came into view around the pillars of the Milwaukee viaduct.

Q. Well, that is the pillars of the Milwaukee viaduct that you went under?

A. I hadn't got to the Milwaukee viaduct yet.

Q. When you say this truck came under what, the Milwaukee viaduct?

A. Came into view to my left.

Q. Oh, to your left?

A. Came into view to my left from my point of view on my engine, to the left of the Milwaukee pillars that are up against our rail.

Q. I see.

A. On the left-hand side.

Q. At the time when you first saw the truck, did you estimate yesterday—I think you did—the distance you [445] believed it was from the crossing?

A. I can't pin point any distance.

Q. Well, we are not asking you to pin point, Frank. You are entitled——

A. I hadn't arrived at the viaduct quite yet when the truck came into view.

Q. Well, but what I am getting at is this: How far, in your present opinion, was the truck from the crossing when you first saw it?

A. Well, the truck, I would estimate about 25 feet.

(Testimony of Francis William Scobee.)

Q. Yes. And when you first saw it, it was moving, was it; is that your testimony?

A. It was moving.

Q. And what did you estimate its rate of speed to have been?

A. Well, it was a slow speed, I couldn't say how fast, but it was a slow speed.

Q. Was it 10 miles an hour or less?

A. I imagine it was 10 miles or less.

Q. 10 miles or less. Now, as it approached that crossing, did it continue at that rate of speed or any rate of speed, or did it come to a stop, or what did it do?

A. It came to a kind of a stop at the crossing.

Q. And at the time it came to a stop, was any portion of the truck on that crossing? [446]

A. No, it was clear of the crossing.

Q. When you first saw it approaching the crossing at this 25 foot distance, what, if anything, did you do with reference to your brakes?

A. I set the brakes.

Q. Well, in what manner, what kind of an application was it?

A. I never looked to see how much application I made, I just made an application of the brakes.

Q. Well, what do you call it? Was it dynamiting or service application?

A. No, a service application.

Q. All right. And then after this truck came to a stop, what, if anything, did you do? Did you release the brakes? A. I released the brakes.

(Testimony of Francis William Scobee.)

Q. That, if I understand, would enable you to regain speed? A. Regain speed, yes.

Q. Now, what is the next thing you did, if anything, with reference to braking?

A. Well, when I seen this truck in a bucking motion start up on the crossing, well, all I had left to do was start shutting my throttle off and grab a dynamite.

Q. When the truck started this bucking motion, was it [447] still clear of the crossing or was it on the crossing?

A. It was bucking up on the crossing.

Q. It was bucking up onto the crossing. All right. And then is that when you dynamited?

A. Close after that.

Q. Now——

A. There is things that I have got to go through.

Q. All right. A. Takes a little time.

Q. Let's get at that right now. By the way, in that train at that time, you are sitting right up in the front, are you not? A. Yes, sir.

Q. You and the fireman? A. Yes, sir.

Q. A speedometer on the train?

A. Yes, sir.

Q. Where is that speedometer located?

A. Down and to my left.

Q. Down to your left. Now, what instruments or mechanical devices are there there that have to do with the operation of that train by you?

A. I have my throttle stand to my left and down.

Q. All right. A. Throttle stand. [448]

(Testimony of Francis William Scobee.)

Q. Your throttle stand to your left and down?

A. That's right.

Q. What is the purpose of the throttle?

A. That is to run my locomotive to pull the train with.

Q. To keep it going? A. Yes, sir.

Q. Does it have anything to do with increasing or decreasing of speed?

A. Yes, you have throttle notches on there. You start from idle position, 1 to 3, right up to 8 position.

Q. All right, that is one gadget, we'll call it. What is the other one you have to use?

A. You have your automatic brake valve.

Q. Where is your automatic brake valve?

A. That is up in the right-hand corner on my right.

Q. What else do you have?

A. And you have your independent brake valve.

Q. Now, you stated that you gave the two long blasts; you didn't get into the short and the long, did you? A. No.

Q. And that is when you decided to dynamite the train, was it?

A. No, that is when I made an application of the brakes, when this truck appeared into my view to my left.

Q. That is the first time—— [449]

A. I had to let go of the whistle to get down and start figuring I might be in an emergency, started shutting the throttle off and I set the air

(Testimony of Francis William Scobee.)

with my right hand, so I had to let go of the whistle.

Q. Then what different maneuvers did you go through there from the time you saw this truck until you ceased making maneuvers?

A. Well, I have to pull the whistle with my left hand.

Q. Go ahead.

A. I had to drop—come down to the throttle and come up here with my right hand for air (indicating). That is my train line air for my train.

Q. After you make the dynamite, is that a full application?

A. A dynamite is when you have dumped all the air.

Q. Dump all your air? A. That's right.

Q. And then that's all you can do?

A. That's all, you just sit there.

Q. And pray? A. That's right.

Q. By the way, what is the fact as to whether or not in connection with mile posts in that area, that Ellensburg is Mile Post 0; is that correct?

A. Mile Post 0 at the depot, yes. [450]

Q. Mile Post 0 at the depot. With reference to the speed tape, was there a speed tape on that engine on that date, that Diesel? A. Yes, sir.

Q. Do you know where that speed tape is located?

A. Right in behind the speedometer, locked up.

Q. Do you have anything to do with putting it in or taking it out?

A. Can't touch it, it is locked.

(Testimony of Francis William Scobee.)

Q. Did you ever have any keys to it?

A. No, sir.

Q. Mr. Scobee, I don't recall yesterday whether you were asked about your maximum speed as you approached that crossing and before you had any knowledge of this truck.

A. Well, the maximum speed in that district was 70 miles an hour.

Q. You were permitted 70? A. Yes, sir.

Q. Well, do you recall, have you any independent recollection, what your maximum speed was as you approached the overpass of the Milwaukee?

A. Well, sir, the last time I looked was approaching the whistle post, was 60 miles an hour, and after leaving there I had to set this air and release, everything was [451] attention on this truck, so I didn't look again.

Q. In other words, the speed tape itself would indicate?

A. The speed tape is the only thing I could go by when I got in.

Mr. McKevitt: That is all.

Cross Examination

Q. (By Mr. Etter): Mr. Scobee, didn't you testify here yesterday under my examination that your train reached a speed of 64 miles an hour?

A. You asked me what the tape showed, I think, sir, didn't you?

Q. I asked you what speed you were going?

A. I believe you asked me what my last speed

(Testimony of Francis William Scobee.)

was that I remember, and I think I said that the last time I recollect was at the whistle post at 60 miles an hour.

Q. Well, where were you going 64 miles an hour?

A. Well, as far as I knew was what the tape showed when I got into the office in Seattle when they took the tape out.

Q. At what?

A. The highest speed I went was 64 miles an hour.

Q. Where? A. Around the viaduct. [452]

Q. Beg your pardon?

A. Around the viaduct and immediately before I dynamited the train.

Q. In other words, just near the viaduct you were going 64 miles an hour? A. Yes, sir.

Q. Beg your pardon?

A. Yes, sir, right around that vicinity. I never scaled it out, all I know is what the tape showed, and my maximum speed in the whole distance between Ellensburg and there was 64 miles an hour.

Q. Well, you say that at the whistle post you were going 60? A. Yes, sir.

Q. Beg your pardon? A. Yes, sir.

Q. And at the viaduct, just before the viaduct, 64? A. Yes, sir.

Q. Is that correct?

A. Some place around in there.

Q. You picked up, then, 4 miles of speed in approximately 520 feet or before that, is that correct?

(Testimony of Francis William Scobee.)

A. Could be right around in there, yes. I never pin pointed on it down.

Q. Beg your pardon? [453]

A. I couldn't pin point on it down; all I know my speed tape showed the maximum speed before the accident was 64 miles an hour.

Q. 64 miles an hour? A. Yes.

Q. And that was just at the crossing the overpass?

A. Right around the viaduct or there close to it.

Q. But you looked yourself at the whistle post and it was 60 then?

A. It was right around the vicinity of 60 miles an hour, yes.

Q. I see. When previous to the time that you looked at it at the whistle post had you observed your speed?

A. Before I reached the speed of 60?

Q. Yes?

A. Well, I had a slow order two miles out of Ellensburg.

Q. Yes?

A. Of 35 miles an hour over a bridge.

Q. That's correct.

A. And I carried that speed, oh, about a quarter of a mile until I got the rear end of my train over it, then I increased my speed.

Q. In other words, when you got out of the slow zone of two miles, you would still have about

(Testimony of Francis William Scobee.)

two miles more to go to get to the crossing? [454]

A. And I started picking up my speed again.

Q. You started picking up your speed?

A. Yes.

Q. When did you pick it up to 50 miles an hour?

A. I couldn't tell you unless I had the tape. There is an area in there, you check your speed as you are going along, but to pick out a certain area where you are doing it, I couldn't tell you that.

Q. Am I correct in assuming, then, that the only recollection that you have here on the manner of your miles per hour is this: That you kept your mileage per hour under 35—

A. Over this bridge.

Q. You went in and came out of the speed zone at 35 miles an hour, and then for the next stretch of approximately two miles you can only be sure of two particular points of your speed—one at the whistle post, when you saw that it was 60 miles an hour, and the other when the tape was examined which showed you going 64 miles an hour just before you got to the underpass—are the only two you recall now?

A. Well, sir, you can't run a locomotive and watch ahead of you and keep your eye glued to the speedometer, either.

Q. I am asking— [455]

Mr. McKevitt: Go ahead.

Mr. Etter: Just a minute—

Mr. McKevitt: He hasn't finished his answer.

Mr. Etter: He isn't answering my question. I

(Testimony of Francis William Scobee.)

am not asking for an explanation, if he cares to give it, I am asking if he didn't——

The Court: What was the question?

(The question was read.)

The Court: Do you understand the question?

A. Yes, sir.

The Court: All right, you may answer.

A. In running a locomotive and running it over a period——

Mr. Etter: That is not responsive.

The Court: Counsel is entitled to have an answer. Then Mr. McKevitt can bring out the explanation.

Mr. McKevitt: If that is the fact, answer yes; if it isn't, answer no.

A. Yes, I guess. Three years ago.

Q. (By Mr. Etter): All right. I think your testimony was, too, under examination by Mr. McKevitt, that on this particular day, I think your statement was to this effect: Immediately or close thereafter, referring to the time you first blew a whistle, you were referring to the whistle post, am I correct?

A. Immediately around the vicinity or there close after. [456]

Q. Or close thereafter, that is a fair, correct statement?

A. Started to blow my first whistle, yes.

Q. And your signal was two longs, a short, and then a long that you carry across the crossing?

A. That——

(Testimony of Francis William Scobee.)

Q. I mean, that is ordinarily your rule?

A. That is the rule for the crossing whistle.

Q. Rule for the crossing whistle. On this date, as I understand, the only whistling from your locomotive was the first two longs? A. That's right.

Q. Beg your pardon?

A. That's right, that's all I blew.

Q. I see, and that's all that you blew. Then when was the next whistle blown that you heard?

A. Immediately after it showed that this truck was going on the crossing, my fireman jumped up——

Q. When was that?

A. Immediately when I had seen an emergency with this truck coming up, I had to let go of the whistle and go down for my air. I had already set the application and released it.

Mr. McKevitt: You are talking too fast, I can't follow you.

A. When the truck momentarily stopped, I released the air [457] and reached up for the whistle again, and the truck started picking up onto the track, so I had to go for my throttle and my brake again, and the fireman, he jumped up and started tooting the whistle.

Q. (By Mr. Etter): If I understand——

A. That was immediately after going under the viaduct or right around in there some place.

Q. If I understand you correctly, then, what you did, you gave two longs—— A. Yes, sir.

Q. And then you reached for your air, is that correct? A. My throttle and my air.

(Testimony of Francis William Scobee.)

Q. Your throttle and your air?

A. My throttle is down here and my air is up here (indicating).

Q. That's correct. What did you do at that time, how much air? Did you give a service application?

A. A service application, the amount I don't know.

Q. That was before you were under the viaduct?

A. It was to slow down the train, anyway.

Q. That was before you were under the viaduct?

A. Before I reached under the viaduct, approaching to it.

Q. Then when did you release the service application?

A. Well, it was around the viaduct there some place.

Q. Around the viaduct. And then did you reach up after [458] you released it and continue your whistling?

A. I reached up to start the whistle again. After setting the air brake back to running position with my right hand and putting my left hand down to the throttle again, I reached up to start the whistle again when the emergency come up with the girl going onto the track, and I had to start over the procedure again, and the fireman in the meantime had jumped up and started tooting the whistle in a frantic way to try to get him off the track.

Q. Do you know how many times he tooted it?

A. I couldn't tell you. It was one of those moments where everything was quick and I couldn't

(Testimony of Francis William Scobee.)

tell you how many times. I know he blew the whistle, but how many times, I don't know.

Q. All right. So if we have it right, that there were two long blasts blown at the whistle stop and before you got to the viaduct?

A. Before I got to the viaduct, yes.

Q. All right. Now, do you recall when it was or where you were, can you give an approximation of where you were from the crossing, the grade crossing, when the emergency arose and the fireman jumped up and started to pull the whistle and you pulled off or pushed off the throttle, I guess it is, and pulled on your brake? [459]

A. To tell just exactly where I was at, I can't tell you. When an object like that comes on there, you don't look to the side or get any idea where you are, you have just got your eyes pin pointed on this one object. And it was in the vicinity of the viaduct or close after, but I couldn't pin point the footage or anything like that, because all I know, I had my eyes on that object, and that's all I can tell you.

Q. This car that you saw down there, the emergency, did it drive right out on the track?

A. No, it bucked its way onto the track.

Q. How far did it buck?

A. It got the front wheels on one rail and the hind wheels on the other rail.

Q. From a distance of how far back, in other words, south of that point?

A. It was clear of the outside rail when it first paused at the track.

(Testimony of Francis William Scobee.)

Q. It was clear of the outside rail. By that you mean it was clear of the rail——

A. On the south side.

Q. Rail indicated as south? A. Yes.

Q. How much was it clear of that rail?

A. In footage, I couldn't say. Eight foot would clear, [460] 10 foot would clear, but I couldn't tell you in footage just how far it was away.

Q. Well, it was more than a foot of six inches, something like that? A. Yes.

Q. I mean, a recognizeable——

A. It was recognizeable to me that it was clear.

Q. And you saw it buck, is that right?

A. You could see it in a jerking motion coming up on the track.

Q. You could see it in a jerking motion coming up on the track. And it was that position, then, it was that you gave an emergency, is that right?

A. It was right around the viaduct there some place.

Q. Around the viaduct?

A. Right around the viaduct. In footage, I don't know how far I was from the crossing.

Q. Well, as you got to the viaduct, it is my understanding that you gave a service application and you had to go through all of these motions of release?

A. This was approaching the viaduct.

Q. Beg your pardon?

A. This was approaching the viaduct that I set this air.

(Testimony of Francis William Scobee.)

Q. Well, approaching the viaduct.

A. And I was releasing it, probably, you would say, going under the viaduct there, close to. [461]

Q. All right. Approaching the viaduct and when you got to the whistle post, you were then, in accord with Mr. Adams' statement, who was your engineer, you were then approximately a distance of 500—he said it was 687 feet from the middle of the viaduct to the crossing, the grade crossing, Mr. Adams testified.

A. I understood him to say something like that.

Q. And he also indicated that the whistle post was 1,323 feet east of the crossing, which, of course, would make the whistle post 636 feet east of the viaduct, middle of the viaduct, is that correct?

A. That should be.

Q. All right. Now, you said that you pulled your whistle at or about the place where the mile post or where the whistle post was indicated by the side of the track as indicated in the pictures?

A. Yes, sir.

Q. That is correct. That you only had an opportunity to pull, I think it was two longs?

A. Two long whistles is all I can recall pulling myself.

Q. And your testimony was the other day that your long whistles were about two seconds with about a two second pause in between?

A. Around that, it is pretty hard to tell just by seconds [462] when you pull a whistle. I don't

(Testimony of Francis William Scobee.)

count or nothing when I am pulling on the whistle. I pull a long and I don't count.

Q. You say you are not sure; would you say your long whistle is longer than two seconds or shorter than two seconds?

A. Sometimes you carry them longer and sometimes you carry them shorter.

Q. Do you say that you carry a long whistle shorter than two seconds and call it a long whistle?

A. No, a long one has got to be carried two seconds or better.

Q. Two seconds or better? A. Yes.

Q. Well, then, it is certain that you carried it two seconds or better, isn't that right?

A. That's right, but to tell you how much more than that, I couldn't tell you.

Q. I thought you were definite yesterday about two seconds.

A. Didn't I explain I believed it was two seconds, but I didn't know how much more.

Q. Well, would it be three seconds?

A. You can't tell, some things is habit to you, you don't count the time you are holding that down. You just hold it long enough you know it is a long whistle, you [463] don't count how long you are holding it.

Q. Well, at least on your testimony yesterday of two seconds per long blast and two seconds for pause——

A. At least two seconds.

(Testimony of Francis William Scobee.)

Q. At least two seconds, on your testimony yesterday, you were traveling then at 60 miles an hour, you have testified? A. Yes, sir.

Q. So you are going 88 feet a second?

A. About that.

Q. Consequently, if you assume that you were giving the two second long and two second pause and two second long, you would have gone 528 feet in a westerly direction at 60 miles an hour from the whistle post toward the overcrossing; am I correct?

Mr. McKevitt: I object to this as being argumentative, if your Honor please.

Mr. Etter: Why is it argumentative? It is a mathematical certainty on his own testimony.

Mr. McKevitt: Well, then, if it is a mathematical certainty, there is no need of asking him the question.

Mr. Etter: Well, I have a right to inquire about it, if he recognizes it. This isn't argumentative; he set the basis.

The Court: Well, go ahead. [464]

Q. (By Mr. Etter): Wasn't your testimony yesterday two seconds?

A. Around there or better.

Q. And isn't it your testimony that you were going 60 miles an hour?

A. About the whistling post, I was going 60. That is about the last time I looked, around the whistling post.

Q. And do you agree with me that if you are

(Testimony of Francis William Scobee.)

going 60 miles an hour, you are covering or you are going 88 feet per second?

A. According to that speed, yes.

Q. That's right. So that in six seconds, you would be going 88 feet times six, isn't that right?

A. Around there.

Q. Or 528 feet, is that right?

A. Right around there, yes.

Q. All right, so on your testimony yesterday, if you gave these two long blasts, with a pause in between of the two-second interval, from the time that you started this whistling at the whistle post here, you went a distance of 528 feet here (indicating), or at that time, in accord with Mr. Adams' testimony, you were in excess of 100 feet east of the intersection when you made your service application of air?

Mr. McKevitt: I object to this as being argumentative. [465]

Q. (By Mr. Etter): Would that be correct?

Mr. McKevitt: I object to that as being argumentative.

Mr. Etter: It is cross-examination.

Mr. McKevitt: No, it is an argument, it isn't cross-examination.

The Court: Well, he may answer.

Q. (By Mr. Etter): Based on your testimony yesterday with regard to the length of time for your whistles and on your testimony of today as to speed, upon the engineer's testimony as to the distances, at the conclusion of your long, a pause and your

(Testimony of Francis William Scobee.)

long, you would still be over 100 feet east of the Milwaukee overpass, isn't that correct?

A. Yes, sir, and I had to let go of the whistle and start for that service application, and how long I carried that service application and released it, I don't know how long that was in seconds or anything like that, except that I had released the air when I seen the truck momentarily stop when I approached the viaduct.

Q. So you were actually making a service application of the air, not under the overpass or beyond, but 100 feet east of it, isn't that correct?

A. It would be beyond it, yes.

Q. Yes. Handing you the Plaintiff's Exhibit 26—— [466]

The Clerk: That is Defendant's.

Q. (By Mr. Etter): Pardon me, Defendant's 26—which is a picture looking west in the direction in which you were going, taken from 700 feet east of the crossing, as your counsel indicated. As Mr. Adams testified, the middle of the viaduct was 687 feet east of the crossing, so that, give or take 13 feet, is about midway?

A. I believe I could see the truck before——

Q. About midway?

Mr. McKevitt: Keep your voice up so we can hear.

A. I believe I could see the truck before I got there.

Q. (By Mr. Etter): That's right.

A. It seems a little closer to me and this picture

(Testimony of Francis William Scobee.)

seems a little closer to me than what I could see from back here, because I am sitting up higher, I am sitting up quite a bit higher than that.

Q. That's right, you had a better view.

A. So I can see to my left a little over by this Milwaukee viaduct. I don't know just exactly the height the cab sits up, but it is quite a bit higher than this picture was taken. So I can't tell whether this is putting me closer or putting me farther back, I can't tell.

Q. I see. Well, here is one taken 900 feet east of the crossing facing west. Would that be closer to it?

A. Yes, that is a little more closer to what the truck [467] appeared from out of the left behind this pillar here (indicating), going in the direction like this and then turning up to the track.

Q. This is 27, No. 27, Defendant's 27.

A. I can't tell just exactly.

Q. Where was it you first saw the truck?

A. I first saw the truck as it approached from behind here (indicating).

Q. From behind where?

A. The top of the truck come out from behind here.

Q. From behind here?

A. There is a cement pillar there.

Mr. Etter: All right, may I have your pen, Mr. Taylor? Excuse me, Mr. McKevitt.

Q. On this picture of 900 feet, would you mind

(Testimony of Francis William Scobee.)

taking this pen, or will you tell me now, you point out where you saw that truck the first time?

A. It is pretty hard to reminisce.

Q. Can you give us an——

A. At first?

Q. All right, at first?

A. That long ago I saw the top of the truck——

Q. Where?

A. As it come from some place.

Q. In here or here or here (indicating)? [468]

A. Well, somewhere in the vicinity in here (indicating), you could see the top of the truck sitting up at the height I was sitting.

Q. All right.

A. See, your camera, somebody standing there on a tripod, where I am sitting up quite a few feet higher, which will let me see better.

Q. All right, right about here (indicating)?

A. Well, right in that vicinity.

Q. You mark it, please, somewhere close to it.

A. Well, I can't pin point it right down because it comes out of there abruptly right there on an angle. It is right around in this vicinity right in here, where I am sitting up higher looking down (indicating).

Q. It is right in this vicinity. All right, will you extend this line out and put your initials out there?

A. Extend what line?

Q. Or extend the line out from this point you have made and put your initials out there?

A. (Witness complies.)

(Testimony of Francis William Scobee.)

Q. And you have put on there "F.W.S."?

A. Yes, sir.

Q. As being the point where you first saw the truck, the top of the truck, is that correct?

A. About the angle I saw. [469]

Q. You saw?

A. I can't tell you in feet, but that is the angle the truck came out into my view.

Q. Into your view, I see. And you were watching it, were you, at the time? A. Yes, sir.

Q. And it was traveling in what direction?

A. Well, kind of at a northerly direction, just about the way the road runs there.

Q. And then when you came under——

A. I figured about 25 feet from the crossing from the time I first saw it until it got to the crossing, I figured about 25 feet.

Q. It had about 25 feet to go?

A. I figured about that, I don't know.

Q. In other words——

A. I never did step it off to see just how much distance I could see.

Q. Of course, I know.

A. But I figured about that distance, I don't know.

Q. In other words, when you were at this crossing (indicating), the automobile was about 25 feet from the crossing?

A. I figure about there, yes, coming up at a slow speed and kind of angling away from me as it ap-

(Testimony of Francis William Scobee.)

proached the [470] crossing, so it is pretty hard to tell how many feet they had to go.

Q. Is that when you made the service application or right after that?

A. Yes, it is, because it is kind of a surprise for somebody to come out from behind there, and you don't know whether they are going to stop, so I made this service application in case they didn't. Of course, when she made that momentary slow down or stop and kind of paused there at the crossing, well, I just released them, just figured it was another one of those things which you run into every day on the road, you have people coming up to the crossing and stopping. You find one that will try to make it.

Q. When did you release the air, release your service application?

A. It was under the viaduct, right around under the viaduct.

Q. Under the viaduct, all right. And how soon right after you released your air did it start bucking?

A. Well, this bucking started right away.

Q. Right away? A. Yes.

Q. In other words, when you came under the viaduct, then you saw the bucking? [471]

A. Yes.

Q. And it was then——

A. Had to go through these quick motions again starting all over.

Q. Quick motions and start all over again?

(Testimony of Francis William Scobee.)

A. I might add, sir, if it is all right with you, that we carry headlights burning on these Diesel locomotives in the daytime, as well as at night, to help warn the people on these highways.

Q. That is an oscillating one, you have two?

A. No, the oscillating one we use at night through the city streets and stuff as that, but we use the headlight in the daytime, as well as at night, but that is just the regular headlight.

Q. The regular headlight. And the car, as I understand it, was approximately from eight to 10 feet south of the rail and this bucking started and it came out on the track? A. Yes, sir.

Q. And did the bucking stop just after it got on the track?

A. It seemed to have stalled right there.

Q. Right there? A. Yes, sir.

Q. And do you recall how far you were away when it appeared to have stalled to you? [472]

A. Well, it appeared to be a little ways, but in footage, I couldn't tell exactly. It is one of those things where you are looking right at an object—

Mr. McKevitt: He is talking about how far away you were away.

A. I couldn't tell how far away I was, because it is just one of those things because you have pin pointed your eyes on the object, it is hard to say, because you haven't looked at your surrounding area or nothing, and moving up at a speed like that, it is just over with pretty quick.

(Testimony of Francis William Scobee.)

Q. (By Mr. Etter): What clothing were you wearing that day?

A. Regular uniform, cap, overalls and jacket.

Q. Were those bib overalls?

A. Yes, sir. And a jacket over them, short jacket.

Q. Jacket. Were those the grey and blue striped one, kind of, or what were they, just the ordinary——

A. I had the——

Q. Beg your pardon?

A. I had the white and blue striped ones, I believe. I don't know what I was wearing three years ago, but——

Q. The point is you had a uniform on that would go on an engineman? A. Yes, like——

Q. Whether it was blue denim or grey or white?

A. It was a regular uniform we always wear.

Q. A pair of overalls?

A. A pair of overalls and a jacket.

Q. Jacket. A. And a cap.

Q. Engineer's cap? A. Yes, sir.

Q. One of those that come with the bill, isn't that right? A. That's right.

Q. And when you stopped the train, or when the train was finally stopped after the collision down the track——

A. Yes, sir.

Q. ——down the track, why, you and the fireman got out of the locomotive, did you?

A. Yes, and inspected the truck on the front end of the engine.

Q. Inspected the truck. Then what did you do?

(Testimony of Francis William Scobee.)

Did you walk back? A. Yes.

Q. To the back of the train. And where did you see Mr. Everett?

A. Shortly after things had calmed down a little bit around there, he showed up. [474]

Q. Where did you first see him?

A. As he approached the crossing, somebody hollered, "Here comes her father."

Q. Somebody hollered what?

A. Somebody hollered, "Here comes her father." There was a lot of people around there at that time.

Q. As he approached—what was that again?

A. He drove up in a car from the same direction the truck came from.

Q. Uh-huh.

A. And jumped out. He was with somebody else and he came running up there.

Q. Where were you at that time?

A. I was standing in the vicinity of where the girl was.

Q. You were standing in the vicinity of where the girl was? A. Yes.

Q. And where was that from the crossing?

A. I believe it was about 75 feet.

Q. About 75 feet from the crossing?

A. About 10 feet off the right of way.

Q. Was it somebody standing where you were that said, "Here comes her father," or was it somebody up at the crossing?

A. There was quite a few milled around in one area. I [475] just heard this out to the side of me,

(Testimony of Francis William Scobee.)

I didn't look to see who said it. Evidently, it must have been a neighbor or somebody that knew him.

Q. Who was around with you there at the time you heard somebody say, "Here comes her father"?

A. Oh, I don't know their names or nothing like that. I am not acquainted in that area, I don't know. Whether my fireman was, I don't know. There was so many people talking. The people started climbing off the train, as well as coming from the highway, because traffic on the highway stopped right now and all the people in the automobiles jumped out and come running over there. It was quite a mixup of people, so it is hard to say who was there and who wasn't.

Q. All right, when somebody said, "Here comes her father," will you tell us what happened?

A. Her father went up and wanted to pick her up.

Q. All right.

A. And the neighbors said—I heard one of the neighbors say, "Well, we'll help out," and I guess it was the coroner and some of the police around there.

Q. One of the neighbors, how do you know it was one of the neighbors?

A. I figured it was one of the neighbors the way they consoled him and everything, they must knew him pretty well. [476] I don't know who they were.

Q. I see. And then will you tell us what occurred, what was said?

(Testimony of Francis William Scobee.)

A. Well, they picked the girl up and put her on a stretcher then.

Q. All right, then what?

A. Then I happened to be walking back down toward the crossing, a little closer to the crossing there, and I seen this fellow nod his head and Mr. Everett come over toward me then and started a conversation, very calm, to me, and I told him I was—how sorry I was that it happened.

Q. Then you two were walking up the track toward the crossing?

A. No, this was at the crossing.

Q. It was at the crossing?

A. See, they had got the girl back, trying to get her to the truck at that time—or the ambulance.

Q. And you were at the crossing, both of you?

A. Right around the crossing there, yes.

Q. Who else was there besides Mr. Everett?

A. I don't know who they are. See, I never got any names of the fellows and they was all strangers to me, and people off the highway and people off of our train, being a passenger train, they all jumped off after the accident. [477]

Q. The two state patrolmen were there first, weren't they, Stanley and Carriger?

A. There were state patrolmen there, yes.

Q. They were standing with you and Mr. Everett?

A. I couldn't tell you whether they were standing there at that time or not.

(Testimony of Francis William Scobee.)

Q. When was it you talked with the state patrolmen, up at the crossing or down at the train?

A. Well, we talked at the crossing there and then they was walking up and down the track.

Q. The state patrolmen? A. Yes, sir.

Q. Now, when you were standing at the crossing, you don't recall who was standing there besides you and Mr. Everett?

A. I don't recall the names or anything like that, no.

Q. I see. And what did you say to Mr. Everett and what did he say to you? I wish you would repeat that, please.

A. Mr. Everett, the closest I can remember it, I noticed this fellow nod to me, see, evidently somebody pointed out that I was the engineer, and Mr. Everett come over and he says, "You the engineer?" and I says, "Yes, I am. Sure sorry this happened." "Well," he says, "I [478] told her to be careful of that train. It hadn't gone yet." And then he says, "I heard the whistle and," and he says, "I heard them short blasts of the whistle, and I knew there was something wrong."

Now, that is as close as I can remember the conversation with Mr. Everett.

Q. What did you say?

A. Feeling sorry, that's about all I could say, sir.

Q. Was that the end of the conversation?

A. Yes, sir.

Q. What did Mr. Everett do then?

A. He had to go back over and talk—he didn't

(Testimony of Francis William Scobee.)

have to, but he did go back and talk to—whether it was his neighbors or who the fellows was. There was a whole bunch around that knew—that appeared to know him, and then there was a coroner, and so on and so forth, around there, deputies.

Q. Did you stay—

A. And the Sheriff and stuff, I guess. There was a lot of fellows around there with badges on, I don't know who they were.

Q. Did you stay on the crossing?

A. Well, I had to go up and direct the wrecker to take this truck off of my engine.

Q. Did you see Mr. Everett again? [479]

A. Never have. This is the first time in this court that I have seen him since.

Q. And you recall that this is the man that you had that conversation with? A. Yes, sir.

Q. Can you tell us how it is that you recall him as you saw him once in 1952? Is there something about him that you can tell us you recall this is the man? A. His face features.

Q. Beg your pardon?

A. His face features.

Q. Anything else?

A. His name is Mr. Everett.

Q. His name. And do you remember what he was wearing that day?

A. Well, I can't recall too much, no.

Q. Beg your pardon?

A. I can't recall too much, no.

(Testimony of Francis William Scobee.)

Q. You can't tell us with any degree of certainty, is that it?

A. Not to a certainty, no.

Q. I see. Mr. Scobee, isn't it a fact the only reason you know this is Mr. Everett is because he was identified before this trial started?

A. No, I can remember his face features, sir.

Q. You can remember his face?

A. Yes, sir. Because this death was a shock to me, too.

Q. Did you see Mr. Klocke when he was here and testified? A. Yes, I saw Mr. Klocke.

Q. Did you remember Mr. Klocke?

A. No, I didn't, never met him before until this trial.

Q. Did you see Mr. John O'Neill testify here today? A. Yes.

Q. Did you remember Mr. O'Neill?

A. No, I didn't remember him.

Q. Did you see Larry O'Neill testify?

A. I saw Larry, yes.

Q. Do you remember seeing Larry at the scene?

A. No, sir.

Q. Do you remember seeing any of the witnesses who testified other than Mr. Everett at that accident?

A. Mr. Everett is the only one that I got to meet and talk with. He is the only one.

Q. He is the only one you got to meet?

A. That is the one I talked to.

Q. I see.

(Testimony of Francis William Scobee.)

A. The police asked me my name; I never asked the police theirs; but that is the only thing that I got to find out who he is and anything about him was just Mr. Everett come up and asked me if I was the engineer and [481] he said he was the father, and that's all there was to that. As far as knowing anybody else, I didn't know anybody in that vicinity.

Mr. Etter: That is all, your Honor.

The Court: Any other questions?

Mr. McKevitt: Just one or two questions, your Honor.

Redirect Examination

Q. (By Mr. McKevitt): You said something about seeing a state patrolman walking up and down the track, is that correct? Did you walk up and down the track with any state patrolman?

A. A state officer walked up and down the tracks. I figured I had to have permission to take the truck off my engine. I am responsible for the engine when I am out there, but, yet, when accidents happen, you have got to have authority to move that vehicle off your engine, which it was stuck pretty tight to my engine, and I had to get a wrecker from Ellensburg to come out and take the automobile off.

Mr. McKevitt: That is all.

The Court: Is that all of this witness?

Mr. Etter: That is all.

(Witness excused.)

The Court: It is time for the afternoon recess.
Court will recess for 10 minutes.

(Whereupon, a short recess was taken.)

Mr. McKevitt: May I proceed, your Honor?

The Court: Yes.

Mr. McKevitt: Mr. Williams.

HARVEY GLENN WILLIAMS,
called and sworn as a witness on behalf of the defendant, was examined and testified as follows:

Direct Examination

Q. (By Mr. McKevitt): Will you state your name to the Court and jury and counsel, please?

A. Harvey Glenn Williams.

Q. I didn't hear your last name. I know it, but I didn't hear you say it?

A. Harvey Glenn Williams.

Q. Williams. And how old are you, Mr. Williams?

A. 42.

Q. Are you a man with a family? A. Yes.

Q. Where do you reside?

A. Yakima, Washington. [483]

Q. What does your family consist of?

A. Two boys and a girl.

Q. What are their ages?

A. The boy 23, and a girl 21, and a boy 19.

Q. And by whom are you employed?

A. Northern Pacific.

Q. And how long have you been employed by the Northern Pacific Railway Company?

A. About 18 years.

(Testimony of Harvey Glenn Williams.)

Q. And in what capacity have you been employed by that company over that period of time?

A. Oh, I was a fireman and an engineer.

Q. Fireman? A. Fireman and engineer.

Q. How long were you a fireman?

A. From 1939 until 1945.

Q. And an engineer from what?

A. From '45 until today.

Q. Until today? A. Yes.

Q. Were you on this train on this date?

A. I was.

Q. In what capacity? A. As a fireman.

Q. On account of seniority is why you weren't running the train? [484]

A. You could call it that.

Q. About how many trips did you make over this crossing on this particular train before the date of this accident, March 8, 1952? Approximately?

A. How many trips on this train?

Q. On No. 5. That was the number of the train, wasn't it? A. Oh, probably 150.

Q. Prior to the accident? A. Yes.

Q. Now, did you see the truck that we have been talking about here on that date?

A. I did.

Q. And where was the Diesel, as nearly as you can remember, when you first saw the truck? Where was the Diesel engine?

A. Oh, I believe it was about—it was just east of the Milwaukee overpass.

(Testimony of Harvey Glenn Williams.)

Q. Are you able to say how far in feet, 100, 200, or 300 feet?

A. Oh, I would say within 100 feet, probably.

Q. Approximately. And where was the truck when you first saw it?

A. Oh, it was about, I imagine, 15 or 20 feet from the crossing. [485]

Q. And was it moving or stationary when you first saw it? A. Moving.

Q. Are you able to give the Court and jury and counsel any idea of the speed of the truck when you saw it?

A. Oh, it was slow, it wasn't too fast.

Q. Well, when you say "slow," do you mean 10 miles an hour or less? A. I would say 10.

Q. And state whether or not that truck, as it approached that crossing, stopped at any point before it got on to the crossing?

A. Well, it slowed down very slow or may have came to a stop, I don't know.

Q. Well, at that time, was it still off the crossing? A. Yes, it was.

Q. And then what did you observe?

A. Well, it started ahead.

Q. Describe its motion. Was it a smooth——

A. Well, it jumped, you might call it jerked, ahead, it wasn't smooth.

Q. Now, do you remember whether or not any whistle signals were given by that train on that date? A. Yes, there were.

(Testimony of Harvey Glenn Williams.)

Q. Are you familiar with this whistling post that we have been talking about here? [486]

A. Yes, sir.

Q. With reference to that whistling post, where did the signals that you know were given start?

A. Well, they started at or very near the whistling post, I would say.

Q. What whistle signals were given by the engineer that you heard?

A. Well, he blew two long blasts.

Q. And then what did he do?

A. Well, he set the automatic air, service application.

Q. Did you give any whistle signals that date?

A. I did.

Q. And you were sitting up there in front with him? A. Yes.

Q. What did you have to do in order to give these whistle signals?

A. Well, I jumped up out of the seat when I saw the truck start for the crossing after it had slowed down.

Q. What did you go for the whistle for?

A. Well, it looked to me like there was going to be an emergency there.

Q. Well, the engineer had been blowing the whistle, and why did you go for the whistle?

A. Well, you can't blow the whistle with your left hand and shut the throttle off at the same time.

Q. I see. In other words, you took over where he left off, is that what you are telling us?

(Testimony of Harvey Glenn Williams.)

A. That's right.

Q. Now, when you went for the whistle, have you any idea where the train was, say, with reference to the Milwaukee overhead?

A. Well, we were by the overhead then.

Q. Well, do you know how far you were by the overhead when you went for the whistle the first time?

A. Oh, I would say it was 200 feet or less. I wouldn't know exactly.

Q. 200 feet west of the viaduct or overhead, is that right? A. That's right.

Q. Do you know how many blasts of the whistle you gave? A. No, I haven't any idea.

Q. Well, what type of whistle signal was it?

A. Just short blasts, continuous.

Q. What you call emergency blast whistles?

A. That is what I would call it.

Q. And do you know whether you gave more than one? A. Yes, I know that.

Q. Do you think you gave more than two?

A. I would say so.

Q. Three? [488]

A. Yes, I think more than three.

Q. All right. Well, what did you see with reference to any person, if anything, in or near that automobile after you started to give these whistle signals?

A. Well, I could see the driver in the cab seemed to be having trouble with the gear shift lever and looking down, I believe, and I could also see some

(Testimony of Harvey Glenn Williams.)

black smoke coming out from the rear of the truck, and it seemed to be that she was having a little trouble with the engine.

Q. And did you see this young girl as she was opening the door and getting out of that truck?

A. Yes, I did.

Q. Did you see her—how?

A. I did.

Q. Well, describe what you saw in that respect?

A. Well, she opened the door and got out on the left side of the truck. Then she went around the truck and I think she tried to close the door with her right hand and at the same time running away from the truck and engine, of course.

Q. Did you see her take any steps away from the truck? A. Yes, I did.

Q. Do you know how many steps she took, approximately? Are you able to judge? [489]

A. Oh, I don't think she made over three or four steps away from the truck.

Q. What have you to say as to the speed of the train around the whistle post, that area?

A. Well, the speedometer faces the engineer and as far as I was concerned, it was just a normal speed of the train at that time.

Q. Well, what is the normal speed of the train at that time and place near the whistle post?

A. Well, it could go 60 miles an hour, that would be normal.

Q. Could be what?

(Testimony of Harvey Glenn Williams.)

A. It could be 60 miles an hour, that would be normal.

Q. Could it be more? A. Could be more.

Q. It could be more, could it?

A. Oh, it could be more or less.

Q. What maximum speed, if you know, were you permitted at that place at that time under company rule?

A. 70 miles an hour at that particular locality.

Mr. McKevitt: That is all. [490]

Cross-Examination

Q. (By Mr. Etter): Williamson or Williams, was it? A. Williams.

Q. Williams. Mr. Williams, when you say the girl went around the truck—is that your testimony?

A. Around the door.

Q. You didn't mean around the truck?

A. No, around the door of the truck.

Q. Went around the door of the truck. How far away, Mr. Williams, were you when you first saw her?

A. You mean how far was the engine from the truck?

Q. Yes?

A. Well, that I don't know for sure.

Q. Was it while you were tooting the whistle that you saw her?

A. Well, I probably saw her when I first saw the truck. That I don't know.

Q. You probably first saw her when you first

(Testimony of Harvey Glenn Williams.)

saw the truck when you were 100 feet east of the overpass? A. Yes.

Q. Handing you Exhibit No. 27, Mr. Scobee has indicated where he first saw the truck, if you recall, his initials appear there. Would that be about where you saw it? [491]

A. I believe that is. That isn't a clear picture, I don't believe, doesn't show a crossing there, does it?

Q. Yes, the crossing is up here (indicating). I can show you another one. That is 900 feet. Here is a picture looking the same way, Mr. Williams, from 700 feet back. In other words, it is just about 13 feet short of being the middle of the underpass. If you will notice, you can see a crossarm down here.

A. Well, in this picture it shows it way up here (indicating); it doesn't show it right here where he has the mark.

Q. It shows what?

A. There isn't any crossing right here where he has the mark.

Q. Oh, no, he indicated that this is where he saw her approaching the crossing; that isn't the crossing. A. No.

Q. He said he saw her approaching the crossing right in through here. It would be here on this picture and where he has marked it on that.

A. I see.

Q. Would that be about where you saw the truck?

(Testimony of Harvey Glenn Williams.)

A. No, I believe it was closer than that.

Q. Closer. Would it be on this one or in between? I mean this one is just going under or just under the overpass. [492]

A. I believe it would be closer to that one.

Q. Would you think it would be a little further west through the underpass or possibly a few feet back toward the east, having in mind that this is 700 and that is 900?

A. I believe it would be a little further back than this.

Q. Fine.

A. Not much, just a little bit.

Q. But it wouldn't be quite as far back as that?

A. I don't believe we were under the underpass when I saw her.

Q. All right, sir, and you saw the truck at that time and you saw the girl in it, is that correct?

A. Well, I saw—probably saw the form of the driver. I don't really know for sure.

Q. Beg your pardon?

A. I probably saw the form of the driver in the truck. I couldn't say whether I did or not.

Q. You probably saw the form of the driver in the truck? A. I think so.

Q. The car was proceeding at that time toward the intersection? A. Yes.

Q. And as I gather from your testimony, it stopped short of the intersection? [493]

A. I don't know that it stopped, but if it didn't, it almost stopped.

(Testimony of Harvey Glenn Williams.)

Q. It almost stopped? A. I would say that.

Q. All right, and how far were you away from it at that time?

A. Well, probably 700 feet or somewheres thereabouts.

Q. Well, that would be when you saw it jerking? A. Yes.

Q. All right. And do you remember how long it was jerking before it got out on the crossing area?

A. What do you mean by "how long"?

Q. Well, you say you saw it jerking when you were about 700 feet back, is that correct?

A. Yes.

Q. Was that when you saw the smoke coming out of it?

A. No, the smoke was coming out of it when it was sitting on the crossing.

Q. Oh, I see. So as I gather, then, it started jerking when you saw it about 700 feet away and jerked onto the crossing?

A. Something like that.

Q. How far did you travel then before it got right out on the crossing?

A. How far did we travel? [494]

Q. Yes? A. Oh, I don't really know.

Q. Well, your engineer, Mr. Scobee, applied his emergency, did he not, as quickly as she got——

A. That's right, as soon as she started.

Q. All right, where was that?

A. Well, that was close to the overpass.

(Testimony of Harvey Glenn Williams.)

Q. Close to the overpass. East of it or west of it? A. Probably west.

Q. Probably west. And, in other words, as I gather it, right at that point Mr. Scobee went into emergency just west of the overpass?

A. Well, some place west of it, I don't know just exactly where.

Q. That is when you reached up and started grabbing the whistle, is that right?

A. That's right.

Q. Now, as I understand, your cab up there, say you were operating the Diesel in this direction (indicating), Mr. Scobee would be to your left?

A. Your right.

Q. To your right, would he? A. Right.

Q. All right. And where would the whistle cord be from you there? [495]

A. About here (indicating).

Q. About there. Did you have to stand?

A. A little further.

Q. Beg your pardon.

A. A little further in that direction (indicating).

Q. Would you have to stand up to grab it?

A. Yes, I would.

Q. Can you illustrate to me about how far you would have to reach?

A. Oh, I imagine just about here (indicating).

Q. About like that? A. Yes.

Q. Would you shut off your view or anything?

A. No, I wouldn't.

(Testimony of Harvey Glenn Williams.)

Q. And you did get up out of your chair?

A. Yes, I did.

Q. And reach for the whistle. And all the time that you were pulling this, you were looking down the track?

A. I got up before I pulled the whistle.

Q. Beg your pardon?

A. I got up before I blew the whistle.

Q. Yes. When he went into emergency, you took ahold of the whistle cord, and while you were pulling the whistle, you were watching up the track?

A. That's right. [496]

Q. About how close were you when you saw the girl get out of the car?

A. I don't know, I imagine 50 feet or something, probably, in that distance.

Q. 50 feet? A. Yes.

Q. Sure it wasn't more than 50 feet?

A. I don't believe so, looked like it was pretty close to me.

Q. And she got out of the car——

A. Might have been——

Q. Beg your pardon?

A. Might have been a hundred, I don't know.

Q. All right, she got out of the car and went around the door and shut it and then started running and ran two or three or four steps?

A. She didn't shut the door, she tried to shut it, I think.

Q. Tried to shut it, you think. Tried to shut it and then ran? A. That's right.

(Testimony of Harvey Glenn Williams.)

Q. Well, were you a hundred feet or were you more than a hundred feet away?

A. I told you I didn't know.

Q. Have you got any idea? [497]

A. I was watching her all the time.

Q. I see. You have no idea, then?

A. I have no idea.

Q. I see. When was it you saw the smoke coming out of the car?

A. Well, I imagine we were about 100 or 200 feet west of this overpass.

Q. West of the overpass? A. Yes.

Q. Did you see somebody in the car then?

A. Yes, I did.

Q. Could you see that it was a girl?

A. No, I couldn't.

Q. Could you see what she had on?

A. No, I didn't see what she had on until she got out of the truck.

Q. Until she got out of the truck?

A. Yes.

Q. I see. What did she have on?

A. Well, she had on a plaid blouse.

Q. That is when she got out of the truck, were you very close to her?

A. I could see through the cab of the truck and see her get out of the truck.

Q. What you saw, then, is substantially the same thing that Mr. Scobee saw? [498]

A. I think so.

Q. You both saw the car come up and you saw

(Testimony of Harvey Glenn Williams.)

it buck onto the track and you saw the smoke come out of it, and so on and so forth; correct?

A. That's right.

Q. Now, when you first saw this automobile as you indicated on that picture some distance possibly in excess of 700 feet but not 900, as the other exhibit showed, were you able to see the whole automobile?

A. Well, I don't know, I doubt it.

Q. Mr. Scobee testified he could see the top of it.

Mr. McKevitt: I object to counsel telling this witness what Mr. Scobee testified.

Q. (By Mr. Etter): Do you recall Mr. Scobee's testimony?

A. Yes.

Q. And do you recall, if you do, that he testified that he could see the top of a car at the point as he indicated on Exhibit 27?

A. Yes, I think he said that.

Q. Yes. Well, now, what was your view of it? Could you see the top or could you see more of it?

A. What do you mean by the "top"?

Q. Well, did you see the whole automobile with the girl in it or somebody in it when you came up right under the underpass? [499]

A. I wouldn't say that I saw all of the car, I don't know.

Q. Well, what part of it did you see? How did you know it was a car?

A. Well, if you could see all but the back wheel, you would probably know it was an automobile, wouldn't you, or you would think it was?

(Testimony of Harvey Glenn Williams.)

Q. That's correct, you probably would. What part of it did you see?

A. I think that probably I didn't see——

Q. All you could see was what?

A. All I didn't see was probably the back wheel or maybe the back fender.

Q. The back fender?

A. I think.

Q. Did you see somebody in the car?

A. Yes.

Q. At that time?

A. That I don't know for sure. I must have, though.

Q. Beg your pardon?

A. I must have, there was someone in it.

Q. And that is from a distance that you indicated when I examined about it, would be possibly just under the underpass or a short distance east of the underpass?

A. That's right. [500]

Q. Beg your pardon?

A. That's right.

Mr. Etter: That is all, sir.

Mr. McKevitt: Have you finished?

Mr. Etter: Yes.

The Court: Just a moment.

Mr. McKevitt: That is all.

(Witness excused.)

Mr. Gaynor.

JOSEPH F. N. GAYNOR,

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. McKevitt): State your name, Mr. Gaynor, for the benefit of the Court and counsel and the jury, please. State your name.

A. Joseph F. N. Gaynor.

Q. G-a-y-n-o-r? A. Yes, sir.

Q. And how old are you, Mr. Gaynor?

A. 56.

Q. Didn't hear you? A. 56. [501]

Q. And where do you reside?

A. Wenatchee, Washington.

Q. A man with a family? A. That's right.

Q. Wife and how many children?

A. I have a wife, a daughter 20, twin sons 18.

Q. I see. And by whom are you employed?

A. By the Great Northern Railroad.

Q. And your headquarters are at Wenatchee?

A. Yes, sir.

Q. How long have you been employed by the Great Northern Railroad Company?

A. It will be 28 years this coming March.

Q. What is your present position with the Great Northern Railroad Company?

A. Superintendent of electrical operations.

Q. And in what other capacities have you been employed by the Great Northern Railroad Company, if any?

A. I have put in 14 years as superintendent of

(Testimony of Joseph F. N. Gaynor.)

electrical operations, 10 years electrical master mechanic prior to that, and four years as traveling engineer.

Q. When you say "traveling engineer," Joe, what do you mean by that?

A. That was engineer in charge of motive power and engine crews, shops, the maintenance and operation of steam, [502] Diesel and electric locomotives.

Q. And when you occupied that position, where were you living?

A. I was living at Skykomish in that position.

Q. Are you a graduate of any professional school?

A. Yes, sir, a graduate electrical engineer.

Q. Of what university?

A. The Catholic University of America, Washington, D. C.

Q. What course did you pursue at that school?

A. Electrical engineering is my major.

Q. You majored in electrical engineering?

A. Yes, sir.

Q. Did you graduate? A. I did.

Q. Did you receive a diploma? A. Yes.

Q. Following your graduation, what did you do?

A. I was hired by the Westinghouse Electric Manufacturing Company at Pittsburgh, Pennsylvania.

Q. How long did you work for that company?

A. Five years.

(Testimony of Joseph F. N. Gaynor.)

Q. What work did you do working for the Westinghouse people?

A. I was a heavy traction engineer for Westinghouse.

Q. Heavy traction engineer? [503]

A. Yes, sir.

Q. What does that mean?

A. That is heavy road locomotives, Diesel, steam and electric.

Q. In other words, Westinghouse manufactures that equipment? A. Yes, sir.

Q. And that was the position you occupied with them during that five year period, was it?

A. That's right.

Q. And just briefly, what did you do in that position?

A. In that position, my job was the construction of locomotives in the shops, the test of same on test track and road. Then as I went along, why, I was moved up into the design department and proceeded from there to field jobs. I put in railway electrifications in different parts of the world.

Q. Did you have anything to do with the electrification of the Great Northern?

A. Yes, sir, I put the motive power in service in the Great Northern.

Q. Between what points?

A. Between Skykomish and Wenatchee, Washington.

Q. Where is Skykomish?

A. That is a town 50 miles—oh, it is about 72

(Testimony of Joseph F. N. Gaynor.)

miles [504] west of Wenatchee at the foot of the Cascades on the west slope.

Q. I see. Now, Mr. Gaynor, you have had, as I understood, your experience with steam, Diesel and electric locomotives? A. Yes, sir.

Q. Able to operate them?

A. I am, I train the men who do operate them.

Q. Oh, that is what I am talking about. You train the men on the Great Northern who operate those things? A. Yes, sir.

Q. Did you have charge of the training of engineers when there was a switch-over from steam to Diesel? A. Yes, sir, I did.

Q. And have you had experience in the operation of Diesel locomotives for test purposes, stopping, and so on? A. Yes, sir.

Q. What is your answer? A. I have.

The Clerk: Your Honor, I have marked the Defendant's 34, 35 and 36 for identification.

Q. (By Mr. McKevitt): Over what period of time, Mr. Gaynor?

A. Right straight through, since 1927.

Q. And where were those tests made? [505]

A. On the Cascade Division, on the various grades.

Q. What was the purpose of those tests? Was that a company program?

A. Yes, it was. In changing over from steam to electrification and then supplementing that with Diesel power, they made new train schedules, higher speeds for both freights and passengers. and in or-

(Testimony of Joseph F. N. Gaynor.)

der to determine the operating speeds to fit the schedules, you first must know where they will stop.

Q. I see. Particularly with pulling into stations, and so on? A. Yes, sir.

Q. Now, Mr. Gaynor, I will show you Defendant's Exhibit No. 34 for identification. Are you familiar with the type of apparatus that is shown in that? A. I am.

Q. That is what, the Diesel?

A. That is the Diesel electric, a 3-unit, 4500 horsepower Diesel electric, known as F-7 type by the manufacturers.

Q. Is that type of locomotive used by the Great Northern? A. It is.

Q. At the present time?

A. They are standard. Just like buying an automobile, you all get the same kind.

Q. And, of course, your company had those in 1952 and prior thereto? [506]

A. Yes, we did, we had them back in the 40's, we began using them.

Mr. McKevitt: I believe you stipulated, counsel, that this is a blueprint of the Diesel that was on this train?

Mr. Etter: Yes.

Mr. McKevitt: Offer it in evidence.

The Court: That is 35, is it, or 34?

The Clerk: 34.

The Court: It will be admitted, then, Defendant's Exhibit 34.

(Testimony of Joseph F. N. Gaynor.)

(Whereupon, the said blueprint was admitted in evidence as Defendant's Exhibit No. 34.)

Q. (By Mr. McKevitt): Mr. Gaynor, I show you Defendant's Exhibit 35 for identification, which is eight prints.

Mr. McKevitt: It is stipulated, Mr. Etter, as I understand it, that these prints are prints of the eight cars that were attached to this Diesel on that date?

Mr. Etter: That is so.

Mr. McKevitt: Thank you.

Mr. Etter: So stipulated. [507]

Q. (By Mr. McKevitt): Are you familiar with that type of equipment?

A. Yes, sir. Our own No. 5 and 6 run that kind of equipment.

Mr. McKevitt: Offer it in evidence.

The Court: It will be admitted, then. That is 35?

Mr. McKevitt: 35.

(Whereupon, the said print was admitted in evidence as Defendant's Exhibit No. 35.)

Mr. McKevitt: What is this number, Mr. Taylor?

The Clerk: That is 36. It is marked when you open it up.

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit 36——

Mr. McKevitt: And with reference to this, your Honor, counsel will correct me if I am wrong, it is stipulated that this was the speed tape that was

(Testimony of Joseph F. N. Gaynor.)

on this engine at the time that this collision occurred, and that after the train arrived in Seattle, it was removed therefrom and it has not been used on any other engine since that time.

Mr. Etter: I haven't seen this, Frank, I just want to look at it.

I would like to know when these names were put on here.

Mr. McKevitt: Immediately after the arrival of the [508] train in Seattle after it was taken out of the box. The box was unlocked and the tape was removed.

Mr. Etter: And is that pencil or is that—

A. That is a stylus. It is a metal pencil that fits into a piston rod that works up and down at the speed.

Mr. Etter: That gives the impression here?

A. That's right, and this is a chemically treated paper that is sensitive to that particular kind of a brass stylus.

Mr. Etter: I see. This was removed in Seattle?

Mr. McKevitt: Well, he doesn't know that. That is what I advised you. Could bring witnesses over to testify to the fact it would take two men, it would be a roundhouse foreman and master mechanic. That's all their testimony.

Mr. Etter: But I will take your word it has been removed and hasn't been touched.

Mr. McKevitt: Under oath, I will so state.

Mr. Etter: All right. I will stipulate that is the speed tape.

(Testimony of Joseph F. N. Gaynor.)

Mr. McKevitt: Offer it in evidence, your Honor.

The Court: It will be admitted, then.

The Clerk: That is 36.

(Whereupon, the said speed tape was admitted in evidence as Defendant's Exhibit No. 36.) [509]

Mr. McKevitt: I think it should be *help* up, if your Honor pleases, while I am asking the questions, so the jury might get some idea what it is. I have looked at it several times and it is still somewhat of a puzzle to me.

The Court: Maybe Mr. Carlile could hold it, then.

Mr. McKevitt: Yes, could you?

Q. Mr. Gaynor, I notice on this speed tape, Exhibit No. 36——

A. Turn it the other way, you have it upside down.

Q. Oh, I see. You say that this is a special type of paper? A. Yes, sir.

Q. Do you have on the Great Northern on certain of your trains speed tapes of this character?

A. We have it on all of our trains.

Q. All of them. And what is the purpose of a speed tape on a train such as this one here?

A. That is so the officials in charge of operation can get some idea what the operation is. I will be explicit, like take our Empire Builders, when we first put them on——

Q. Make it brief.

A. All right—they were faster trains and, being

(Testimony of Joseph F. N. Gaynor.)

a faster train, certain speed limits were set up between points. Some of the men have a tendency to make use of excess [510] power they had and run too fast. Sometimes passengers get throwed over when they go around curves that way and damage suits come. Therefore, every tape is sent to the trainmaster's office at headquarters and it is examined before it is filed, and that is for the protection of the company, and if a man is alleged to have done something, speeded, and he didn't, that tape will protect him as well as hang him if he is exceeding or going outside the rules.

Q. All right. Now, I notice these circular little holes on the top and the bottom of this tape, Joe. What do they indicate?

A. Those holes do a double duty. There is a roller that is driven by the drive mechanism that meshes with them and each dot is one-half inch apart and that is equivalent to one mile, a locomotive has to progress one mile.

Q. The space between these dots, then, is one mile?

A. Yes, sir.

Q. You might say they represent mile posts on the road?

A. They represent mile posts of distance.

Q. Now, I notice a broken horizontal line on that tape. What does that represent?

A. That represents a vertical distance up this way (indicating) and the curve will give you the miles an hour [511] that the train is running at any point.

(Testimony of Joseph F. N. Gaynor.)

Q. It represents a vertical distance?

A. Vertical distance in miles an hour.

Q. Now, I notice a faint line, Mr. Etter called attention to it, you can trace on here and it fluctuates. What is that?

A. That is the actual speed at every point of the run that the locomotive and train is making from the time it starts out of a terminal until its run is ended.

Q. Are you able to determine from a speed tape, or this speed tape, whether or not brakes were applied at different points?

A. Yes, you can tell.

Q. You can tell that. Now, is there anything else about the markings on here that I haven't asked you which I should ask you so you can give——

A. No, you have covered it. A train starting out at a point, picking up speed, then it runs along, levels off. This particular section here (indicating), a train is running some place around 70, comes down around 60, that will tell a professional engineer looking at that a little information about the grade, too.

Q. It will, huh?

A. But to the train officials, the trainmasters who examine that, all they look at is to see between [512] about—our own road, now; I am not too familiar with yours—between Seattle and Everett, if the train runs 80 miles an hour, then we can

(Testimony of Joseph F. N. Gaynor.)

find some passengers thrown around, then that engineer is all done.

Q. Well, it would show on this tape?

A. That's right.

Q. Now, the Ellensburg station is marked on there?

A. Ellensburg is marked right here (indicating).

Q. And is the scene of the crossing designated?

A. Well, the stopping point of the pilot of the locomotive is designated by this drop here, at this point here (indicating), so that that locates everything in terms of Ellensburg; in other words, the crossing is so many miles from Ellensburg.

Q. How many miles is it? It has been testified four——

A. 4.75 miles, and miles zero at Ellensburg.

Q. In other words, you start at Ellensburg at zero, is that correct?

A. Yes, sir, and you run out when you come to the end of this, this stops at mile post 5.

Q. And you locate the crossing——

A. Then you locate the crossing in terms of 4.75 and the mile post 5.

Q. All right. Now, begin with Ellensburg and ending at or near the crossing, are you able to determine from [513] this speed tape what the speed of that train was?

A. Yes, sir.

Q. Tell us.

A. You can see that okay. Starting at zero at Ellensburg——

(Testimony of Joseph F. N. Gaynor.)

Mr. McKevitt: Are you blocking some jurors' view, Max?

A. I will make the tracing with my pencil and you can follow the pencil. This direction is the direction of travel west and this would be the miles per hour (indicating).

Starting at Ellensburg at zero miles an hour, the train comes out and makes a little jog, and now that wouldn't mean much to another man, but to me it means the engineer applied his running test in here some place or the speed would have gone up faster. Then at one mile, he is going 45 miles an hour; at the end of mile 2, he is up to 55 miles an hour; then he makes a jog down. Now, that jog is out between 2 and 3 miles, two and a half and three miles. That is evidently where that slow order was. And then he come down around 37 miles an hour, I would call it, and he holds it about a quarter of a mile. Then he picks his speed on up and we go from that point, and in one mile he is up to about 60 miles an hour. Then—— [514]

Q. Where is he at that point with reference to Ellensburg or the crossing?

A. With reference to the crossing—we will take Ellensburg, start from there, 1, 2, 3, 4, at mile 4, he is up to 60 miles an hour, and at mile 5, he is stopped at 4.75, he is right about at 64 miles an hour and it had been running that way for some little distance there.

Q. Now, does that exhibit indicate anything about whether brakes were or were not applied?

(Testimony of Joseph F. N. Gaynor.)

A. It does, it shows what they were speaking about here at some point. Well, you can take it from here (indicating), the speed is going on up here, but instead of going up and reaching 64 at a point up here——

Q. When you say “a point up here,” what are you pointing to?

A. Well, it would reach 64 miles an hour, to reach—I will call that terminal speed, because that is the maximum speed it made—it would have reached terminal speed over here, say, a quarter of a mile farther than it did if a brake application had not been made to hold that acceleration down, and it was a service application because it only changed the slope of the curve slightly. Then at this point (indicating) it shows that an emergency braking began. [515]

Q. When you say “at this point,” where is that with reference——

A. That point is right on that crossing, on mile post 4.75, retardation begins and it stops at mile post 5, about a quarter of a mile beyond the crossing.

Q. In other words, it began really to take hold at that point, is that what you mean?

A. It took hold at the crossing, yes, sir.

Q. Now, is there anything else in connection with this tape or effective in this lawsuit that I haven't asked you about?

A. No, you have covered where it stopped at Ellensburg, started, and there is the stop after the

(Testimony of Joseph F. N. Gaynor.)

accident (indicating); there is the run in between the slow order in here.

Q. Now, where is this tape located when it is on the locomotive and in operation?

A. As the engineer sits, assume I am sitting in the engineer's seat, over here is his brake equipment, automatic brake valve and independent brake valve, air gauges in front of them, throttle over here to the left, and also to the left just about at eye level is the speedometer (indicating). That looks like a clock looking at it, calibrated in zero around to 75, usually for the freight engines, and up to 120 on high-speed [516] jobs. And in the top of that tape—or on the top of that box, there is a door that is locked and raises up, and inside of that is where that speed tape and the mechanism to drive it is located. When your hand shows 50 miles an hour on the indicator that the engineer sees, he don't see the tape, he sees the indicator, it is making that mark on the tape, and all variations is spotted on there because the indicator that marks the tape is driven from the hand.

Q. In other words, the tape operation is synchronized with the speedometer operation?

A. That's right, and they are driven from one of the wheels.

Q. Is that standard equipment——

A. Yes, sir.

Q. ——on Class I railroads?

A. That is standard on Diesels, electric or steam engines that use that type speedometer.

(Testimony of Joseph F. N. Gaynor.)

Q. What have you to say with reference to its accuracy?

A. Its accuracy is the best that can be made by the manufacturers. It is known as a positive displacement type.

Q. A what?

A. A positive displacement. It is a hydraulic pump, and the faster that they turn the drive from the wheels, [517] the more volume it shoves up against the piston, and as it does, it just bends the piston farther, because the piston itself is just a slot with the piston in the cylinder there.

Q. Now, I want to go back to these Exhibits 34 and 35. 34 is the Diesel, is it not?

A. Yes, sir.

Q. Now, what type of brakes were on those wheels?

A. Westinghouse brakes are on there and have the Electomatic braking speed system, which is the latest air brake used on roads.

Q. I notice over here some notations, speaks of weight with total load so many pounds. What does that mean?

A. Total load consists of water in the heating tanks where they carry heating boilers for heating the train; sand, which is used automatically on these engines in case of emergency application or the wheels tend to slide, the sanders come on automatically; and fuel oil, each one carries 1200 gallons of fuel oil, about 7 pounds to the gallon, why, you got quite a lot of fuel load.

(Testimony of Joseph F. N. Gaynor.)

Q. Well, now, is there another weight designated on there?

A. Yes, there is a weight dry. That is just as you would get the machine, say.

Q. Well, no, there is——

A. There is a light weight. [518]

Q. Yes. That means without the load?

A. That means without the load, without the heat and boilers and stuff.

Q. This light weight, that means all of the equipment minus——

A. The heating boilers and stuff that is extra, because these engines could be freight engines and not have a heating boiler.

Q. What I am getting at is the weight of this Diesel at the time of this accident. It would be so many pounds plus whatever——

A. Fuel has been used and the water used.

Q. Well, we'll forget the fuel and water.

A. Okay, you use your light weight in this case.

Q. Yes, use the light weight. Isn't it shown right here (indicating), light weight, how many pounds?

A. 693,800 pounds.

Q. 693——? A. 693,800.

Q. My bifocals aren't much good, I thought it was 680. Are you sure it is 693 or is it 683? You can see better than I can. Just so we are accurate on it. A. Yes.

Q. 693,000 pounds? A. 693. [519]

Q. Now, showing you——

(Testimony of Joseph F. N. Gaynor.)

Mr. Connelly: What is the final weight, Mr. McKevitt?

Mr. McKevitt: 693,000.

A. 800 pounds.

Mr. Connelly: Thank you.

Q. (By Mr. McKevitt): Now, going to 35, which——

The Court: That is the Diesel, I assume?

Mr. McKevitt: That is the Diesel, your Honor, yes.

Q. Now, going to Exhibit 35, which are prints of the cars that the Diesel was pulling, what is the total weight of the mail and express car shown on there? Isn't it on this column over here (indicating)?

A. Yes, sir, the total weight is 152,700 pounds.

Q. Now, go to the next.

A. That is mail and express car.

Q. Now, the next is the mail storage?

A. Storage car.

Q. What is the total weight of that?

A. 132,300.

Q. All right. Now, go to the next.

Mr. Etter: May I just see that first one?

A. Sure.

Mr. Etter: You are combining the weight of the body and the trucks and giving us the total? [520]

Mr. McKevitt: Total weight, those are all totals, Max.

Mr. Etter: Fine.

Q. (By Mr. McKevitt): Now, your total——

(Testimony of Joseph F. N. Gaynor.)

A. We gave that 132,300.

Q. That is the mail car? A. Yes.

Q. Now, let's go to this baggage car, what is the total weight of that?

A. Baggage car is 143,800.

Q. Yes.

A. Another baggage car, total weight 144,850. Going too fast?

Mr. McKevitt: Are you getting those, Ellsworth?

Mr. Connelly: Yes.

A. And the next is a lay-back seat of coach, 158,300.

Q. 158,300?

A. Yes. You now come to de luxe coach, 143,700.

Q. 143,700.

A. And reserve seat coach, weight total 159,600; cafe coach, 173,700; and that is all.

Q. I had that total weight added up and I have misplaced it some place.

Mr. McKevitt: May I confer with counsel and maybe we can agree on the total weight? [521]

The Court: Yes.

Mr. Connelly: I am going to add all this. Why don't you just tell me what *it*?

Mr. McKevitt: I think it is 960 tons total, I think you will find it, after you make all those additions and divide by 2,000.

Mr. Etter: We will stipulate that unless we find it incorrect.

Mr. McKevitt: All right. I am not saying that

(Testimony of Joseph F. N. Gaynor.)

960 is right on the nose; I think it is 960 plus, not over 961.

Q. Mr. Gaynor, in determining what distance a train of this character on a particular grade of track, and, by the way, you were in court all during this trial, weren't you, and heard the grade described? A. Yes, sir.

Q. Having that in mind and a dry rail and this type of equipment and the consist of it and weights, what factors have to be taken into consideration in determining within what distance that train can be stopped going at any rate of speed?

A. Going at any rate of speed, the main factors concerned with stopping that or any train is, first, your brake pipe pressure carried; next, your braking ratio; then the brake system efficiency. Another factor entering [522] in this is the coefficient of friction.

Q. Well, now, stop right there. The coefficient of friction, what is meant by that?

A. It is a percentage of the actual drag of the brake shoe on the wheel compared to the pressure of the shoe against the wheel.

Q. I see. Any other factors?

A. And the adhesion factor between the wheel and the rail, which is a friction factor just proportional to the weight carried by the wheel.

Mr. Etter: Will you repeat that last one?

A. Adhesion factor between wheel and rail.

Mr. Etter: Thank you.

(Testimony of Joseph F. N. Gaynor.)

Q. (By Mr. McKevitt): Does that complete them, the factors that you had in mind?

A. That is all the factors you need right now until you get to using your power.

Q. Now, in determining stopping distances, are there lags that you have, if that is a proper expression, take into consideration?

A. Yes, sir, there are.

Q. And what are they?

A. There is the reaction time or lag.

Q. What do you mean by the reaction time or lag?

A. The time it takes the engineer, when he sees something [523] is coming up, to go through the motions and get that brake valve tripped over into full emergency.

Q. Over into full emergency? A. Yes, sir.

Q. You heard Mr. Scobee describe what he did on that date? A. I did.

Q. Have you an opinion as to what time it took him to go through those maneuvers? Answer that yes or no. A. Yes.

Mr. Etter: Just a minute. I don't think he has qualified the witness to testify as to some medical reaction of Mr. Scobee or somebody else, and that is what this is. This has nothing to do with the mechanical end at all, and I will object to it because he is not properly qualified to testify about Mr. Scobee's or anyone else's reaction time.

Mr. McKevitt: If he weren't qualified, I can't find somebody that is.

(Testimony of Joseph F. N. Gaynor.)

Mr. Etter: I have made the objection.

Mr. McKevitt: The reaction time of the individual engineer under a situation of this kind, I think, is a subject——

Mr. Etter: This would have to be an examination as to the psychological elements that enter into it. I mean, to me, it is a purely medical problem and a medical question. He isn't qualified, an engineer, I don't think to—— [524]

The Court: I am inclined to think that it might be a subject of expert testimony as to what the average reaction time would be, the usual. As to Mr. Scobee, I don't know, he would have to be examined by a medical expert, I think, to determine what his reaction would be.

Mr. Etter: If he is going to qualify the witness as to average reaction time, if he can, that is something else again, but I don't think he has.

Mr. McKevitt: I agree with you that——

The Court: I don't think he has so far.

Mr. McKevitt: I should have asked the question what the Court suggested.

Q. Have you an opinion as to what the average reaction time is of the average engineer in making an emergency stop such as was made under the conditions here existing? A. Yes.

Mr. Etter: I think that is all right.

A. I have timed many of my own men.

Q. (By Mr. McKevitt): Well, what is the average reaction time?

A. Average time for a man to go after that

(Testimony of Joseph F. N. Gaynor.)

brake valve, that is, just the motion of going for it and tripping it, is just about a second, and I put a stop watch on to check them. [525]

Q. Then after he throws that lever into full emergency, is there anything else that could have been done on that date to stop that train?

A. Not a thing.

Q. Now, what other element or lag is there?

A. There is a lag known as the braking lag, equipment lag.

Q. Explain that to the Court and jury.

A. Equipment lag, the brake system is a series of charged-up cylinders charged up from the train line or brake pipe, and in making an emergency application, the air that is in this brake pipe has to be gotten rid of first, and as it does, then the triple valves on the cars or control valves move to let the stored air under each car as auxiliary reservation go into the brake cylinder and push it out against the wheel.

Q. And in order to get full braking application, do you have to get it on every wheel on the engine and on every car? A. That's right.

Q. And on the number of wheels shown on these diagrams that are in here, isn't that true? Your answer is yes? A. Yes.

Q. What is that time element?

A. That time element by actual stop watch test will run [526] from three to three and a half seconds.

Q. In other words, do I understand you to mean

(Testimony of Joseph F. N. Gaynor.)

by that that after the full application is made and before you got full application, three to three and a half seconds elapses?

A. Yes, sir, whatever speed the train is doing, it will proceed for about three to three and a half seconds before braking becomes effective.

Q. Now, having in mind the weight of this train as shown on these exhibits and assuming it to be 960 tons, and having in mind the grade of this track that has been testified to here, and the fact of the dry rail, have you an opinion within what distance that train could be brought to a stop going at 50 miles an hour? Have you such an opinion?

Mr. Etter: Just a minute——

A. I have.

Mr. Etter: Pardon me, counsel. Did you estimate horizontal, level track?

Mr. McKevitt: On the grade that is here, slightly ascending, isn't it?

A. Ascending grade, five-tenths per cent, that the stop was made on, yes, sir.

Q. Yes, that is the testimony of Adams.

The Court: That is assumed as part of your question, I take it? [527]

Mr. McKevitt: Yes.

The Court: The grade.

Mr. Etter: I wondered if he had it in.

Mr. McKevitt: Oh, I had the grade in.

Mr. Etter: All right.

Q. (By Mr. McKevitt): Have you an opinion within what distance that train could be stopped

(Testimony of Joseph F. N. Gaynor.)

going at 50 miles an hour? Have you an opinion?

A. Yes, sir.

Q. What is it? How do you estimate it?

A. Does the counsel there permit?

Q. Go ahead, what distance can it be stopped in?

A. 50 miles an hour, about 1,250 feet.

Q. Is that an estimate of one way or another, or is that the least in which it can be stopped?

A. That is about the least it can be stopped in, yes, sir.

Q. Now, going at 55 miles an hour and under the same state of facts, have you an opinion within what distance it could be stopped?

A. Yes, sir.

Q. What would that distance be?

A. Between 1,400 and 1,450 feet.

Q. And at 64 miles an hour under those conditions the speed is maintained, and within what distance could it [528] be stopped going at 64 miles per hour with a full emergency application?

A. Total stopping distance, 1,800 to 1,850 feet.

Q. Now, assuming that engineer applied his brake in emergency 1,000 feet east of this crossing going at 64 miles an hour, have you an opinion as to what extent the speed of that train would be slackened in point of seconds of time?

A. I have.

Q. What is that at 64 miles an hour?

A. At 64 miles an hour, the train would go 1,000 feet in 10.6 seconds on a free run, that is, an unrestricted run. An emergency application in

(Testimony of Joseph F. N. Gaynor.)

that same time would take the train 14.8 seconds to cover the same distance, or it would take 4.2 seconds longer for it to reach the crossing, if you are taking the crossing as the point from which that distance is figured.

Mr. Etter: That is from 1,000 feet?

A. From 1,000 feet, yes, sir.

Q. (By Mr. McKevitt): It means that in this instance, if he went into an emergency when he was 1,000 feet from the crossing, assuming the truck was on the crossing, he would have given that girl a maximum of an additional four and some seconds?

A. That is correct, about four and a quarter seconds to get out of the way. [529]

Q. Now, at take 50 miles an hour, if he was going 50 miles an hour and he applied his emergency 1,000 feet from the crossing, what additional time would he have given the occupant of this truck to escape?

A. At 50 miles an hour, on a free run and an unbraked run, it would take about thirteen and a half seconds for the train to reach the crossing from 1,000 feet out.

Q. In other words, the train is traveling approximately 75 feet a second, is that correct?

A. That is correct, about 74 feet a second, and an emergency-brake run at 1,000 feet from the crossing would take about 18.8 seconds to cover the distance, or there would be an additional five and

(Testimony of Joseph F. N. Gaynor.)

a third seconds, about, for anyone to get off the crossing.

Q. That is with the emergency?

A. With an emergency, yes, sir.

Q. At 50 miles an hour at 1,000 feet?

A. At 1,000 feet, yes.

Q. Now, take a distance of 700 feet, assuming that at 700 feet this train had been dynamited going at 50 miles an hour, what additional time would that have allowed the occupant of this car?

A. It would take it 9.4 seconds to reach the crossing from 700 feet out on a free run. [530]

Q. That is, without brakes?

A. Unbraked, no brakes. And if it were braked, it would take it about ten and a half, so you would get somewhere around about, oh, one and a third seconds time.

Q. How many?

A. One and a third seconds extra, about.

Q. That would be the additional time you would give them under those conditions?

A. Additional time, yes, sir.

Q. Well, now, if at 700 feet from that crossing this train is going—the last speed I gave you was 50, wasn't it?

A. 50, yes, sir.

Q. The train was going 60 miles an hour, what additional time would it have given to that girl if he dynamited at 700 feet?

A. The free run to the crossing would be about eight seconds at 60 miles an hour from 700 feet away, and with an emergency braked run from 700

(Testimony of Joseph F. N. Gaynor.)

feet away, the time to get down to the crossing would be, oh, about five and a quarter seconds.

Q. Well, how much additional time would have been allowed, then?

A. Around two and three-quarter seconds.

Q. How much?

A. About two and three-quarter. [531]

Q. Assuming that the train is going 64 miles an hour and it is dynamited at 700 feet, what additional time would that dynamiting have given that girl?

A. 64 miles an hour at 700 feet?

Q. Yes.

A. Free run would be about 7.4 seconds to get there unbraked.

Q. Unbraked?

A. Unbraked. And with emergency braking on there at 64 miles an hour, it would—

Q. 64?

A. At 64—about eight and a half seconds.

Q. Give her an additional time of how much?

A. Take eight and a half seconds to get down there braked, so the difference between those two would be—the first figure was eight, I believe I gave you—about half a second.

Q. About half a second's time? A. Yes.

Mr. Etter: Didn't you testify 7.4 and 8.5 rather than half a second?

A. You got that equipment lag is in there, 300 feet is off, because when he dynamites, if he is 1,000 feet off, he has only got brakes for the last 700

(Testimony of Joseph F. N. Gaynor.)

feet, that is where he is slowing down. On a free run, you are running a full 1,000 feet. [532]

Mr. McKevitt: You are talking about this computation difference?

Mr. Etter: Yes.

Mr. Connelly: Yes.

Q. (By Mr. McKevitt): What they are talking about is your computation as to what additional time would have been given the girl to get out of the car at a certain rate of speed at a certain distance from the crossing.

A. Okay, 64 miles an hour at 700 feet is your question?

Q. Yes, he brakes at that point, the full emergency application. A. Okay.

Q. Now, what if he had applied his brakes at that point, how much more time would he have given the girl to get out of the truck and get away from there?

A. You are getting outside of the computation I have made here. I will figure this for you in just about two or three seconds.

Q. That is what I want.

A. Okay, 64 miles an hour at 700, that is your question?

Q. 64 miles an hour, 700 feet.

A. Okay. 1.2 seconds is correct.

Q. That is the additional time it would allow?

A. Additional time, yes, sir. [533]

The Court: Will counsel step up to the bench just a moment?

(Testimony of Joseph F. N. Gaynor.)

(Whereupon, the following proceedings were had before the bench, in the presence but out of the hearing of the jury:)

The Court: Is this your last witness?

Mr. McKevitt: Yes, your Honor.

The Court: You will require some time for cross-examination, I presume, with this witness?

Mr. Etter: Gosh, I don't know, it may not be too much at that.

The Court: Do you have rebuttal, do you know?

Mr. Etter: About three questions of one witness, that's all.

The Court: Do you want to try to finish tonight?

Mr. Etter: I would rather not.

Mr. McKevitt: I got a heck of a cold over the holidays.

The Court: Well, we have all day tomorrow, and I had in mind taking the forenoon to discuss these instructions and motions, anyway.

Mr. McKevitt: Fine.

The Court: I think we might as well quit, and then when you get through in the morning, I will excuse the jury until the afternoon. [534]

Mr. McKevitt: I will check with Joe, I don't think I have very many more questions to ask.

Mr. Etter: Actually, I don't think we are going to have too much with this witness.

The Court: Unless you want to go on, I would rather quit now.

Mr. Etter: Could we jointly ask him one ques-

(Testimony of Joseph F. N. Gaynor.)

tion on this speed graph you have here that I can't tell? Can we do that?

Mr. McKevitt: Sure.

Mr. Etter: He asked that it be admitted.

The Court: Any objection to it?

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Mr. McKevitt: You mean the tape, Max?

Mr. Etter: Yes.

Mr. McKevitt: While he answers, let him come down here. Let's hold it up, you hold it up in front of the jury with me here. I don't know whether we got it upside down or not.

Mr. Etter: No, we have got it right here. [535]

Voir Dire Examination

Q. (By Mr. Etter): Mr. Gaynor, what I want to ask you about your speed tape here, you have here point of impact with truck, but I don't know what they mean. What do they mean is the point of impact? There is no point marked.

A. Well, the point of impact on there——

Q. Where do you see that?

A. Where do you see that?

Q. It is right on point of impact with the truck?

A. What they are going by is that little jog, see that, that suddenly kicks up right here (indicating).

Q. Right here?

A. Right at the beginning of the curve, that little kick-up there. When you hit, it just—as a

(Testimony of Joseph F. N. Gaynor.)

matter of fact, that is one of the ways we recognize impact points from tapes.

Q. And that is the point right there?

A. That point right there. The point of impact that they have marked is the kick-up of the needle as the engine struck the truck. That was rising along at given speed and when it hit the truck, why, the only way it could go was up.

Q. And, Mr. Gaynor, as I understand your testimony, the point of the impact is this dot that is marked on what [536] you might call the confluence of those two lines?

A. Well, this line and the vertical begins to drop, comes together.

Q. Where they come together is the point of impact? A. That's right.

Mr. Etter: All right, thank you, sir.

The Court: It is time to suspend now, members of the jury. We should, I think, finish the testimony in this case early tomorrow morning, that is, not long after we convene, and then there will be some other matters to take up, decisions of law points, so I will probably excuse you until about 1:30 and then have the argument of counsel in the case, and I expect to submit the case to you for your decision sometime late tomorrow afternoon, probably. And with that in mind, after the case has been submitted to you, of course, you won't be permitted to separate until you have agreed or have been given reasonable time and opportunity to agree, so that you had better prepare to come and

(Testimony of Joseph F. N. Gaynor.)

stay for awhile tomorrow. It might be well to bear that in mind and not have your families expecting you home for Canasta or bridge tomorrow, you might be kept rather late.

Court will now adjourn until tomorrow morning at 10 o'clock.

(Whereupon, the trial in the instant case was [537] adjourned until 10 o'clock a.m., Thursday, January 20, 1955.)

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to-wit:)

Mr. McKevitt: Sorry for the delay, your Honor. Mr. Gaynor was unavoidably detained.

The Court: All right, so I understand.

All right, proceed, Mr. Gaynor will take the stand.

Had you finished with your direct examination, Mr. McKevitt?

Mr. McKevitt: No, I have one or two more questions. [538]

JOSEPH F. N. GAYNOR

having previously been duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. McKevitt): You are the same Mr. Gaynor who has already been sworn and was on the stand yesterday? Your answer is yes?

(Testimony of Joseph F. N. Gaynor.)

A. Yes.

Q. Mr. Gaynor, since we adjourned last night, at my request, did you make any computations as to the effect of a slowdown of a train by an emergency application of the brakes?

A. Yes, sir.

Q. And did you select certain distances of the train from the crossing? A. I did.

Q. And did you select different speeds of the train? A. Yes, sir.

Q. What distances of train from the crossing did you select?

A. The distances that were spoken of as the mile board, or the whistle board distance, 1,320 feet; the distance between the Milwaukee overpass and the crossing, 686 feet; and the intermediate distance in between that, [539] 1,000 feet.

Q. And what rates of speed did you select?

A. 50 miles an hour, 55, 60 and 64.

Q. What was the result of your computation?

A. A train traveling 64 miles an hour, making an emergency application at the underpass, 686 feet, would arrive at the crossing about 1.85 seconds later than a free-running train unbraked.

From 1,000 feet——

Mr. Etter: Take that a little slow, please. All right.

A. From 1,000 feet, traveling 64 miles an hour, emergency braked, would put that train on the crossing 5.1 seconds later than an unbraked train at the same speed and distance.

(Testimony of Joseph F. N. Gaynor.)

From 1,320 feet, at 64 miles an hour, the emergency-braked train would arrive on the crossing 8.5 seconds later than the unbraked train.

Mr. Etter: That is at 1,323 feet?

A. 1,320 feet, yes, sir.

Q. (By Mr. McKevitt): One question in that regard. Would the train still be moving when it reached the crossing? A. It would.

Q. All right, go ahead.

A. At 60 miles an hour, an emergency-braked train from [540] 686 feet would reach the crossing $2\frac{1}{4}$ seconds later than the unbraked train.

From 1,000 feet, the same train would reach the crossing 5.9 seconds later than the unbraked train.

From 1,320 feet, 60 miles an hour, the emergency-braked train would reach crossing about 9.5 seconds later than the unbraked train.

Q. Go ahead.

A. 55 miles an hour, an emergency-braked train from 686 feet would reach crossing 2.88 seconds later than the unbraked train.

From 1,000 feet, the same train would hit crossing 6.6 seconds later than a free-running train.

At 1,320 feet, 55 miles an hour, emergency-braked train would reach crossing 10.5 seconds later than the free-running train.

50 miles an hour, 686 feet, the emergency-braked train, 4 seconds later on crossing.

From 1,000 feet, same train, 8.1 seconds later on crossing.

And if an emergency application were made at

(Testimony of Joseph F. N. Gaynor.)

1,320 feet, 50 miles an hour, the train would reach crossing about 12.6 seconds later.

Q. Than an unbraked train?

A. Than the unbraked train, yes. [541]

Q. Does that conclude your computation?

A. Yes, sir, that is it.

Q. And the train that you are referring to, for the purpose of the record, is the train that is shown in Exhibits 34 and 35?

A. That is correct.

Q. And one more question I overlooked asking you yesterday: What is the height of the Diesel locomotive measured from top of rail to top of the Diesel?

A. Top of rail to top of cab roof is 14 feet and one-quarter inch. And from the top of rail to the top of horn——

Mr. Etter: Top of what?

A. From top of rail to the top of the horn or klaxon, is 15 feet, zero inches.

Mr. McKevitt: That is all, you may examine.

The Court: What was the height of the Diesel again, 14 feet?

A. 14 feet, one-quarter inch, to the top of the roof. Then the horn sticks up above there the difference to 15 feet.

Mr. Etter: Are you finished, Mr. McKevitt?

Mr. McKevitt: Yes, Mr. Etter. [542]

Cross Examination

Q. (By Mr. Etter): Mr. Gaynor, looking at De-

(Testimony of Joseph F. N. Gaynor.)

fendant's Exhibit 35 for identification, can you tell me whether marked on there some place have we got the outside length measurements?

A. Outside length here is measured between——

Q. Keep your voice up, Mr. Gaynor.

A. Outside length is measured between pulling facing of the drawbar, 74 feet, 21½ inches over the buffers.

Q. All right, now, as to this particular car that is in this exhibit, the length of that car would be 74 feet, 21½ inches; is that correct?

A. Yes, sir, as shown.

Q. As shown. The mail storage car, is it indicated there, the overall length? I see the inside length.

A. We will have to add these.

Q. I notice that is 10 feet, 8?

A. 10 feet, 8.

Q. 42 feet, 11? A. 42, 11.

Q. That is 53, 7, correct? A. And——

Q. 53, 7, that is 64, 5, correct?

A. About right.

Mr. McKevitt: 65 feet? [543]

Mr. Etter: 64, 5.

Q. All right, the baggage car, 73 feet, 6, over end sills?

A. That is correct, over those end sills, but there is the total length here of the car (indicating).

Mr. McKevitt: Keep your voice up, please.

A. The total length of the car as shown is the

(Testimony of Joseph F. N. Gaynor.)

length between buffers where they come together between cars.

Q. (By Mr. Etter): All right, what would that be? A. 82 feet, $41\frac{1}{2}$ inches.

Q. 82 feet, $41\frac{1}{2}$ inches. Baggage car?

A. 82 feet, $41\frac{1}{2}$ inches.

Q. The lay-back seat coach?

A. 79, $81\frac{1}{2}$ over buffers.

Q. And the deluxe coach?

A. 82, $101\frac{1}{2}$ over buffers.

Q. The reserved seat coach?

A. 79, 9, over buffers.

Q. And the cafe coach?

A. 81, $23\frac{3}{4}$ over the buffers.

Q. All right. Now, the Diesel, Mr. Gaynor, which is Exhibit 34, can you tell me what the overall length of the units is?

A. This shows your A unit, we call them, the operating cab, and the B unit, as 100 feet, $91\frac{1}{8}$ inches, or the total length of the three cabs, that is, of the A, B [544] and the middle and the A control cab in the opposite end, 151 feet, $51\frac{1}{2}$ inches, over the couplers.

Q. Over the couplers? A. Yes, sir.

Q. All right. The total length of the train, then, would be the addition of the figures that we have used in the two exhibits? A. Correct.

Q. Now, in computing the factors, Mr. Gaynor, that you gave us yesterday under counsel's direct examination that have reference to the stopping of the train within a particular distance of the appli-

(Testimony of Joseph F. N. Gaynor.)

cation of the air, you told us that, among a number of things, including the braking rates and the brake system efficiency and, I think, six or seven factors, but likewise in answer to questions of counsel you gave other factors which you referred to as lags.

A. Yes, sir.

Q. That is correct. And I think your testimony was that the average reaction time in taking off the throttle and pulling on the air was one second to trip it?

A. One second to the air brake itself.

Q. To trip it, was it?

A. To trip it, one second to trip the brake.

Q. That's right, that was the reaction? [545]

A. After the man decided an emergency is up.

Q. Correct.

A. And the total lags involved from the evidence here, a man was whistling, let go of the whistle, reached down, got the brake and then shut off, I would estimate that to be an average reaction for an ordinary man would be about $2\frac{1}{4}$ seconds altogether. That included the one second to trip that.

Q. Fine. In other words, the lag time from what you know of this, in other words, coming from the whistle down, as you say, to pulling the brake on and throwing the throttle off, you would estimate at $2\frac{1}{4}$ seconds?

A. For that particular operation. Then getting your brake, I would estimate your total lags there would be between 5 and $5\frac{1}{2}$ seconds.

Q. Well, the other lag that you are speaking

(Testimony of Joseph F. N. Gaynor.)

of is the—— A. The equipment lag.

Q. The equipment lag? A. Yes, sir.

Q. And I think yesterday you said that the equipment lag ordinarily would be 3 to 3½?

A. 3 to 3½, yes, sir.

Q. So there were two lags, the reaction lag and the equipment lag? A. That's right. [546]

Q. And speaking to the facts in this case, it would be your expert opinion that the lag time, that is, having reference to the human lag, the human reaction lag, and the mechanical lag, would be what, again? A. About 5 to 5½ seconds.

Q. About 5 to 5½?

A. 5, 5½ seconds, for all of it, yes.

Q. Now, having reference now to the speed tape, you indicated yesterday on the speed tape, you explained the way of reading it. In other words, as I hold it here this way, reading up is your——

A. Miles per hour.

Q. Speed in miles an hour. In other words, starting 10, 20, 30 and going up to 120?

A. Yes, sir.

Q. Reading lengthwise or horizontally on those lines as equal distance, or rather between the punched holes on the side, is a half inch?

A. And that is equivalent to one mile.

Q. That is equivalent to one mile?

A. Of travel, yes, sir.

Q. In travel. And the marker as the train proceeds makes the line which is shown? In other words, you can note from the line the increasing

(Testimony of Joseph F. N. Gaynor.)

speed, the service applications, emergency, and otherwise, by following that [547] line, is that correct? A. That is correct.

Q. Consequently, you are able, are you not, to ascertain distances fairly accurately that train traveled and at what speed by a reading of the speed tape? A. That is correct.

Q. That is correct. Now, if you will step down here just a moment, I would like to ask you a question or two about it.

Mr. Etter: Mr. Connelly, would you hold up the end of this, please?

Mr. Connelly: Yes.

Q. (By Mr. Etter): Just on that part of it, would you step over here? I would like the jury to follow this so they understand it, Mr. Gaynor.

Mr. McKevitt: Mr. Etter, this juror can't see.

A. I can read this thing from the ground here.

Q. (By Mr. Etter): Now, starting the tracing just as an example here, Mr. Gaynor, before we get into it, will you start explaining, oh, from maybe a couple of inches, starting with this line down here at the 10 mile mark so the jury understands perfectly how that operates?

A. Okay, what is that?

Q. Wymer. [548]

A. Wymer. At Wymer, or one mile and a half beyond Wymer, train started out and come up to 20 miles an hour there, 40 miles an hour. They run along, apparently the grade dips a little in there because we have variations in speed, and he held

(Testimony of Joseph F. N. Gaynor.)

his constant speed there, just barely rolling, until he got out here (indicating). Either the grade eases off or there is a little downhill pitch. Must be an ease-off on the grade because there is not sufficient variation here to indicate brake application.

Q. I see.

A. Just the normal rolling of the rails. Coming into Ellensburg, a service stop was made.

Q. How can you tell that service stop?

A. By the slope.

Q. By the slope? A. Yes.

Q. All right.

A. The other one is a violent slope; this is a gradual stop. The stop was begun out here around three-quarters of a mile and comes to a stop. And then it started at Ellensburg, which would be mile post zero as given, and at one mile out, train was going 45 miles an hour.

Q. Indicated by where you now point out?

A. Right here is 45 (indicating). [549]

Q. 45, all right.

A. Then in another mile, he got to 55. See it right here, these two lines (indicating). Then in about a half a mile, he slowed down to around 37, 38 miles an hour.

Q. That was in that protected zone?

A. Protected zone, slow order.

Q. All right.

A. And he held that slow order for about a quarter of a mile, then he began accelerating again, and a mile from there he is back up to about 50 miles

(Testimony of Joseph F. N. Gaynor.)

an hour. And he comes on up here, where it flattens out a little. Now this grade is apparently on either relatively straight or light descending. Then at this point you can see where the thing pitches sharply down.

Q. Well, now, on this line, can you show us whether or not there is a service application of air shortly before this accident occurred?

A. Yes, you can see where there has been a service application of air, where the line would start up in slope and then flattened out slightly.

Q. And you have reference now right to that blue line where it goes here and then it flattens out?

A. Well, here, you are coming up here and accelerating.

Q. That's right.

A. And then your acceleration broke off and flattened out [550] a little bit.

Q. All right, where is that?

A. Let me get that reference.

Q. All right, just turn it around this way.

A. Here (indicating) the acceleration is going along at a fairly level rate until you get up to about 60 miles an hour. That acceleration rate continues, it would come up to that speed that way (indicating), but it leveled off here.

Q. Leveled off right—

A. Right at about that point there.

Q. Leveled off?

A. Yes. All right, the speed, we will work back from the stop point.

(Testimony of Joseph F. N. Gaynor.)

Q. All right.

A. One, two, three, from three and a half miles back of where the train finally stopped.

Q. Two and a half, isn't it?

A. Yes, two and a half, for that slow order. After the slow order had been passed through, the acceleration began picking up at a fairly even rate. Then when they got up to 60 miles, the acceleration was arrested and the speed maintained at about 60 for what looks like, oh, roughly between a half a mile——

Q. Half a mile? [551]

A. Yes, about that.

Q. All right.

A. Then the speed after that point proceeds to accelerate again, which would indicate a release at this point where the curve goes up.

Q. All right.

A. And it was going along at about 64 miles an hour, and then it suddenly dropped to zero in a distance of about a quarter of a mile.

Q. And there is a dot that appears right while the train is accelerating, is that correct?

A. Well, while the train is—see, it runs continuous speed here.

Q. Running constant? A. About 64.

Q. It is even? A. Even at 64.

Q. No jigs or jags?

A. No, it is even for a distance there of about half a mile, and that dot there just before the tape drops——

(Testimony of Joseph F. N. Gaynor.)

Q. Is the collision?

A. That dot pin points the collision. The inertia of the train, no matter how heavy the train is, anything you hit, you can feel the impact.

Q. So that dot—— [552]

A. You don't on the train, but an instrument on there like a speedometer or a guage, you just see the kick.

Q. So that dot indicates, in your expert opinion, the impact because it would bounce that needle a little bit?

A. That's right.

Q. That's correct. But from the dot back for a portion of this as indicated on the gradual run at 64 miles an hour. for a half a mile back there is about a constant speed of 60 miles an hour?

A. Just about.

Q. Just about. And a half a mile back where you see it rising would indicate the air release from the service application?

A. That is correct.

Q. That's correct. By the way, was there any service application of air from half a mile back of the point of impact until the point of impact as indicated on your chart?

A. The service application would be indicated, this indicates the release at this point (indicating).

Q. That is the release. Is there any other service application from the point of release to the point of impact?

A. No, sir. [553]

Q. All right.

A. Just the emergency.

Q. Just the emergency?

A. Yes.

(Testimony of Joseph F. N. Gaynor.)

Q. That distance, as you said, from the release of the service application to the impact was a half mile. You gather that, do you not, Mr. Gaynor, because it is about half the distance of the half-inch marker as indicated by the holes in the side?

A. The last part, the flat part of that curve, would indicate somewhere around about a quarter of a mile that the train had been proceeding.

Q. That's right.

A. At about 64 miles an hour.

Q. That's right.

A. Or around 1,300 feet.

Q. The flat part of the curve?

A. Yes, sir.

Q. That's right. The service application had been released, though, as you say, a half mile back?

A. Yes, the service application had been released at a point where that got up onto that flat part.

Q. That's right. And when it got up on the flat part, then it accelerated up to 64 and then for about a quarter of a mile was running at 64 miles an hour [554] before the impact.

A. That is correct.

Mr. Etter: That is all, Mr. Gaynor.

Mr. McKevitt: That is all.

Defendant rests.

(Defendant rests.)

The Court: Do you have rebuttal?

Mr. Etter: Mr. Ernest Everett.

The Clerk: You may take the stand, Mr. Everett. You have been sworn.

ERNEST EVERETT

plaintiff herein, resumed the stand in rebuttal, having been previously sworn, testified further as follows:

Direct Examination

Q. (By Mr. Etter): Mr. Everett, did you see Mr. Scobee here when he testified?

A. Yes, sir.

Q. Had you ever seen or talked with Mr. Scobee before you saw him in this courtroom?

A. No, sir.

Q. Did you talk with him at all on the date of your [555] daughter's death?

A. No, sir.

Q. Did you talk with any railroad man?

A. Yes, sir.

Q. Who was that? A. The conductor.

Q. How was he dressed?

A. In his uniform.

Q. What kind of a uniform?

A. Well, a conductor's uniform. He had a plate on his cap.

Q. I see. And what did he look like?

A. Well, he was kind of short, smallish man.

Q. And is he the only one you talked to?

A. Only railroad official that I talked to.

Q. Do you remember that you talked to any man that was dressed in the fashion Mr. Scobee said that he was that day? A. No, sir.

Mr. Etter: That is all.

(Testimony of Ernest Everett.)

Cross Examination

Q. (By Mr. McKevitt): Did you seek out the railroad conductor or did he seek you out? [556]

A. Well, he picked me out.

Q. Pardon me?

A. I was standing by my daughter looking at her and he came over there and wanted to know who she was, and I told him she was my daughter. And he started to ask me her name and one thing and another, and in the meantime I looked down the track, I saw another train coming, I says to him, I says, "Here comes another train." "Never mind," he says, "we have a flagman out down there." That's about all that was said that I remember of. And I helped put the girl on the stretcher and somebody else took my end of it and they took her away, and I walked down to the crossing and Mr. Klocke took me home.

Q. Well, you heard Mr. Scobee testify that you told him you had heard some whistle signals from the train? You heard his testimony?

A. How was that?

Q. You heard Mr. Scobee testify yesterday that you told him that you had heard this train whistle? You heard him so testify?

A. I heard him testify, yes.

Q. Did you hear the train whistle?

A. Yes.

Q. And did you know where the train was when you heard it [557] whistle?

(Testimony of Ernest Everett.)

A. No, the train goes behind some timber there that I couldn't tell where it was at.

Q. Well, with reference to the Milwaukee overpass, was it toward Ellensburg or this side of—

A. Well, you see, there is timber and brush down below the Milwaukee, and from where I was standing, after they went behind that timber in there, I couldn't tell where the train was.

Q. But you did testify that standing where you were in the yard that day repairing this bridge or tearing down a bridge over a creek—that is what you were doing? A. Yes.

Q. Wasn't it your testimony that you saw the train a mile and three-tenths away?

A. Why, sure, I could see down toward Ellensburg, but I couldn't see the underpass.

Q. I see. And what kind of whistles was it then that you actually heard?

A. Well, I thought it was a tooting, I couldn't—

Q. Well, were they long blasts?

A. Short, just kind of short whistles.

Q. Pardon? A. Short.

Q. They were short blasts of the whistle. [558]

Mr. McKevitt: That is all.

Mr. Etter: That is all.

(Witness excused.)

I have about two questions I wanted to ask Mr. Gaynor to clear up a point I just remembered.

The Court: All right.

Mr. Etter: Mr. Gaynor, would you take the stand?

Mr. Gaynor: Sure.

JOSEPH F. N. GAYNOR

recalled for further cross-examination, having been previously sworn, testified further as follows:

Cross Examination—(Resumed)

Q. (By Mr. Etter): Mr. Gaynor, I forgot to ask you one or two questions. I think you can answer them very quickly for me. On the lag time that you talked about, that is, the 5-second lag time, now assuming, as you indicated yesterday, the train running at the speed it was running, considering the factors which you were considering, could have been stopped in 1,800 feet or 1,850 feet. Do you remember that? A. Yes, sir.

Q. Now, when you are speaking of that 1,850 feet, are you [559] speaking of the 1,850 feet from the time that the brakes take hold, or are you speaking of that 1,850 feet as being the time that it could stop from the beginning that he starts to make his motion and including the lag time?

A. From the very beginning and including the lag time.

Q. And including the lag time?

A. Yes, sir.

Q. So that the lag time, as I understand it, is the time that there is no effect of braking because of the mechanical lag and because of the reflex human lag?

A. The reaction lag, just the man seeing an emergency come up and going after his levers.

(Testimony of Joseph F. N. Gaynor.)

Q. That's right.

A. But the equipment lag, that is a matter of volumes of air cylinders and piping under the cars, it just has to dump before the brakes can apply.

Q. I see. Now, a man here in this particular situation running, as you have indicated, at the particular speed which he was running and including the lag time, you think that under this situation there was a 5-second lag.

A. I would say including his reactions, there was, yes.

Q. I see. A. Five to $5\frac{1}{2}$ seconds. [560]

Q. In other words, during that length of time, during that 5 seconds traveling, when you are traveling at 64 miles an hour, how many feet would that be? A. 94 feet a second.

Q. 94 feet a second? A. Yes.

Q. So 470, would that be about right?

A. 470 would be it.

Q. 470. So putting this together, from the instant that an automobile or something would be detected, the lag time would occur, that is, the 5 seconds, isn't that correct?

A. If you take an average, between the 5—

Q. I am talking about the average.

A. Yes.

Q. But there would be an average in this case of about 5 seconds lag time?

A. I would say that, yes, 5, $5\frac{1}{2}$, in there.

Q. So the train would travel about 470 feet before braking power became effective?

(Testimony of Joseph F. N. Gaynor.)

A. That's right.

Q. That's right. And then it would travel approximately another 1,400 feet by the time it came to a stop?

A. As shown on your tape there, traveled about 1,320 feet after the brake took ahold. [561]

Q. In other words, so there was 470 feet before it took ahold at all, because of the lag time, and then there was the additional 1,350, or there have been varying estimates of that? A. Yes.

Q. But that is what you indicate by the chart?

A. That's right, that is what the tape showed.

Mr. Etter: That is it, thank you.

That is all, your Honor.

The Court: Just a moment.

Mr. McKevitt: One moment.

The Court: There may be some redirect. I assume this was just additional cross, so you have redirect.

Mr. McKevitt: I may have one question, your Honor.

Redirect Examination

Q. (By Mr. McKevitt): Using the 5, $5\frac{1}{2}$ seconds, you increase that 470 feet then to about 516.23, don't you?

A. Just about, if you use $5\frac{1}{2}$.

Mr. McKevitt: That is all.

The Court: Any other questions?

Recross Examination

Q. (By Mr. Etter): Did you estimate how far

(Testimony of Joseph F. N. Gaynor.)

the front end of the train [562] was beyond the crossing where the accident occurred?

A. Yes, I did.

Q. What was your estimate?

A. 1,320 feet by the impact mark on the tape to where it stopped.

Q. To where it stopped?

A. A quarter mile, yes, sir.

Q. 1300 and—— A. 20 feet.

Q. 1,320 feet from the impact mark?

A. From the impact mark on the crossing, yes, sir, a quarter of a mile even on that tape.

Q. And does the tape indicate that immediately after the impact, the air took hold?

A. It indicates that the air was just taking hold at about impact.

Q. Just at impact?

A. Because just a little bit after this case, but I will give you, when we struck a car on a crossing and a freight train had the same, the impact came up and we ran for about 800 feet after the impact before the tape dropped. Now, that gives you the action time of the brakes.

Q. Right. On the speed chart, though, here, about the same time as the impact, it would be reasonable to [563] assume, the brakes took hold?

A. Impact and braking were simultaneous, I would say.

Q. Simultaneous? A. Yes, sir.

Mr. Etter: Thank you.

A. Effective braking.

Mr. Etter: Thank you.

Mr. McKevitt: That is all. May he be excused?

Mr. Gaynor may be excused?

Mr. Etter: Yes, he may. Thank you, sir.

The Witness: Okay.

(Witness excused.)

Mr. McKevitt: Defendant rests, your Honor.

The Court: Do you have any other testimony, Mr. Etter?

Mr. Etter: That is all, your Honor.

The Court: I see, all right. Both sides have rested, then, I assume.

All right, members of the jury, as I indicated yesterday, there will be some matters we have to take up that will consume the rest of the forenoon, so I am going to excuse you now until 1:30 this afternoon. Report back here at 1:30 and then we will have the argument and the Court's instructions and submit the case to you for your decision. You will be excused now. [564]

Court will take a 10 minutes recess before proceeding.

(Whereupon, a short recess was taken, after which the following proceedings were had in the absence of the jury:)

Mr. McKevitt: May I proceed, your Honor.

The Court: Yes.

Mr. McKevitt: The defendant having introduced its evidence and having rested, and the plaintiff having introduced its evidence in rebuttal and having rested, the defendant Northern Pacific Railway Company renews the motion made at the close of

plaintiff's case and moves the Court to direct the jury to return a verdict in favor of the defendant railway company.

Without restating the grounds urged yesterday, I request permission to have the reasons assigned for the motion for directed verdict at the close of plaintiff's evidence incorporated as reasons for the present motion. Is that acceptable?

The Court: Yes, that will be acceptable. It will be assumed that you have merely renewed them at this time.

Mr. McKevitt: Yes. In addition to those grounds, the defendant, in support of its present motion for a directed verdict, now asserts that under all the evidence [565] introduced, it conclusively appears that there was no proof of any substantive character to establish the material allegations of the complaint, and particularly the allegations which cover the application of the doctrine of last clear chance.

Now, off the record, Mr. Oden, if your Honor is still of the same mind that there is a question for the jury, I won't go into a legal argument on the matter. I am confident that there isn't and I think that the only evidence here that could in any event, not admitting that it is sufficient, take the case to the jury, is the alleged failure of the defendant railway company, through its engineer, to have begun this whistle signal at the whistling post, rather than in the vicinity of the underpass. And even accepting that to be true, plaintiff's evidence in that respect, which we must, of course, for the

purpose of this motion, it is the defendant's position that, under all the evidence in this case, it was not a proximate cause of this accident; and, furthermore, under the decisions of the Supreme Court of Washington, which is, as your Honor very well knows, binding upon this Court in cases of this character, even the absence of any signals, under particular circumstances, is not sufficient to charge a defendant with negligence. It can do nothing in that particular, but yet if the physical facts at the crossing are such, [566] having in mind the right of way of the defendant, that the plaintiff's daughter saw or should have seen that train before she got onto the crossing, then she was guilty of contributory negligence as a matter of law, because she violated a positive statute of this state which requires the operator of an automobile to have it under such control as to be able to bring it to a stop within 10 feet, at least, of the closest rail.

The Court: I might shorten this, Mr. McKevitt, by asking counsel to discuss, if he wishes—I mean, counsel for the plaintiff——

Mr. McKevitt: Very well.

The Court: ——the individual or separate grounds of negligence set out in the complaint except (d) and (e).

Mr. Etter: Beg your pardon?

The Court: Except (d) and (e). I am, to say the least, doubtful about whether there was sufficient evidence to warrant submitting the other grounds of negligence to the jury, other than (d), which is the failure to give the statutory whistle or bell signal, and (e), which is the last clear chance.

I also think we might consider, too, whether I would be warranted in submitting both phases of the last clear chance doctrine. The engineer, there is positive evidence here, of course, and the engineer admits that he [567] saw the position of the truck with the girl stopped on the track, but——

Mr. Etter: The question is when he saw it.

The Court: I tried to follow his testimony closely, it is rather indefinite. To use his words, he didn't "pin point" it. And there was evidence of other witnesses that they saw the truck stopped on the crossing just as the train was coming through the underpass. So that my impression is that there would be leeway there for the jury to find that in the exercise of reasonable care, since he had a clear view down the track, he should have seen and appreciated her position of danger before the evidence indicates he actually saw it.

Mr. Etter: I think there is a question here, too, of when he did see it. I don't think the jury is bound by any statement he may make.

The Court: Oh, no. If there is substantial evidence that he should have seen it before he did, then both phases should be given.

Mr. Etter: That is correct. Do you want me to argue on both phases?

The Court: No, I just wanted to get your reaction, whether you are in agreement with me that both phases should be given.

Mr. Etter: Absolutely, absolutely. Now, your [568] Honor, as I understand, your Honor is concerned with (a), (b), (c), (f) and (g).

The Court: Yes.

Mr. Etter: Now, the matter of a defective crossing, your Honor, as to the question of the maintenance of the ballasting and likewise the situation or the condition that has been shown here by the evidence as to there being a four and a half to five inch drop from the top of the plank and as indicated by the exhibit, I submit that a number of cases here——

The Court: Well——

Mr. Etter: This is outline.

The Court: I don't seriously question that a defective condition right alongside of the planking and forming almost a part of the planking crossing there would be negligence if it had continued long enough to assume that the railroad company had notice of it.

Mr. Etter: That is correct.

The Court: And there is evidence of that here, I should think, but the thing that concerns me is whether there is any substantial evidence of a causal connection, whether there is any evidence of proximate cause on which the jury could find that the death of this girl proximately resulted from that condition of the crossing.

Mr. Etter: I think, your Honor, my theory is there [569] can be contributing causes which can be proximate causes.

The Court: Sufficient if it is a proximate, doesn't have to be the one?

Mr. Etter: Doesn't have to be the one, it can

be a combination of them. Here there might be the last clear chance after they saw her, but the original position in which she found herself could have been a combination under the doctrine of her negligence, as they maintain, and the jury is entitled to determine it, and likewise whether or not it is their negligence if the jury elected, say, to disregard last clear chance and say, "Well, no, it isn't that; it is the fact that it was their negligence in maintaining the ballast." And I have——

The Court: What inference would the jury have to draw now?

Mr. Etter: The inference the jury could draw was the fact that this girl, going up this steep incline in gear and going slow so she could look or see what was coming down, in view of the evidence that it was difficult to see and in view, as a matter of fact, of the engineer's testimony that he only saw it 25 feet away when he came under the underpass, which would mean she couldn't have seen him, being down in a car, sitting in a panel truck, at an angle about two feet above the ground, looking through the brush, while he was sitting up in a position 15 feet when he [570] could look down, so that the jury could assume that as she went slowly onto the track, that as her front wheels went over, the back wheels hitting this bump, there wasn't sufficient power; in other words, she wasn't in gear or didn't have the accelerator down far enough to take her over and it killed the motor.

And all these cases I have here, eight or ten, that happened in each case, because of two or three inch

dropping to the rails or in the plank and the car stalled because of that.

The Court: Of course, in those cases there probably was evidence that that was the cause of the stalling, wasn't there?

Mr. Etter: The evidence was from the driver that as he went over this bump, the car dropped down and did stall. Now, here there is nothing, but we have circumstantial evidence and circumstantial evidence alone from which a reasonable inference may be drawn by the jury and they are in common and ordinary every-day life. For instance, I think your Honor, at least I have, has gone up on a curbing near the entrance to the roadway and had the car stall. I think everybody has had that situation.

So it is on that basis, we have no direct testimony of the deceased as to what caused her car to stall, but we have the evidence that it was stalled, now we are [571] looking for the cause. And I have those number of cases, but I am not going to go into those because your Honor understands exactly what my position is.

The Court: Yes, I do. All right.

Mr. Etter: Now, your Honor, actually the other allegations of negligence with respect to the excessive speed, referring now to (a), and the matter of the signal and the matter of watchmen and the maintenance of the roadway in the proper condition, I think that is a question of fact for the jury to determine under the peculiar circumstances which have been shown here and under the case of Brad-

shaw vs. Seattle, which is the latest one, railroad case, in 43 Washington (2d).

Mr. McKevitt: What page number?

Mr. Etter: Page 766. Now I want to point out, your Honor, this is——

The Court: Bradshaw vs. Seattle?

Mr. Etter: Bradshaw vs. Seattle, 43 Washington (2d), 766; 264 Pacific (2d), 265. The reason that I have this case, your Honor, is this: There is quite the same problem here as is raised by counsel for the Northern Pacific, the defendant. Counsel has made reference here, “Well, we don’t have to maintain this country road, that isn’t our job, and there is no law that says we have to do it. If the county wants to maintain their road, fine and dandy; if they don’t, [572] that is none of our business.”

Now, this case came up on the basis of a suit brought against the Northern Pacific Railroad and against the City of Seattle. The accident happened on a street in Seattle where tracks came across the highway, and some of them had been torn up and one of them had been left in there, it hadn’t been used a great deal of time, and the street itself was maintained in good condition, and along the side there was some brush. So this fellow was driving along the avenue and he approached this, and, of course, his allegation was the train came across here, it was unusual for it, he hadn’t expected it, hadn’t seen it a number of times before.

The Court: I just begin to recognize that. That is cited at the bottom of one of your instructions here.

Mr. Etter: That is correct.

The Court: 43 Washington, 766. I examined that last night. That is on the theory that this crossing is so extraordinarily and peculiarly dangerous, it is the duty of the railroad company of taking special precautions to have watchmen.

Mr. Etter: That is correct.

The Court: Or special signaling device.

Mr. Etter: Signaling or signs or some particular warning. [573]

Now in this case the Court said that: "A crossing * * *" and, of course, it refers to another case that was cited:

"A crossing is extrahazardous where unusual circumstances or conditions exist which make it so peculiarly dangerous that prudent persons cannot use it with safety unless extraordinary measures are used. Considering all the circumstances present in this case, including the similarity in appearance between this crossing and the abandoned ones on the same street, the infrequency of its use, the limited view of an approaching train, and the lack of warning precautions, we cannot say as a matter of law that the crossing was not extrahazardous."

Now, there they had those elements of the infrequency of use, limited view of an approaching train. We have the limited view of approach; we have the lack of warning precautions; we have the existence of the planking in the condition it was; we have the angle upon which cars enter that highway at an angle directly opposite from the overpass; we have the existence of the brush; we have a slope going

up finally, as indicated, in a distance of about [574] 60 feet; in other words, we have 200 some feet without any slope and then a gradual one, and then we have a four and a half foot approach there right to that track, with ballasting in the way; and we have a 45 or an 80 degree angle turn across the top of it.

My position here is this: I don't think I can say as a matter of law that it is or isn't, but I think that under this case and under some other cases I have here, that those elements, so far as we are concerned, all go to the question—I mean, all make a question of fact for the jury as to whether or not they consider it as such.

Now I want to cite the case applying to those four sections that are under discussion of *Van de Water vs. the New York and Northeast Railroad*, 26 New York Supplement and——

Mr. McKevitt: What page?

Mr. Etter: 26 New York Supplement, 397.

They held there that an instruction that a railroad operating trains at crossings must use greater vigilance where the danger is greater, and that any neglect to give a warning of the approach which is proper under the peculiar circumstances renders——no, that isn't the one. Let me see here. Oh, 22 L.R.A., 233, that is what I wanted to read, 22 L.R.A. 223:

“Due Care. This is usually a jury question”——

Mr. McKevitt: 233, Max?

Mr. Etter: Yes, 233. (Reading):

“This is usually a jury question, and whether

or not, in view of obstructions, the railroad has exercised ordinary care in respect to the peculiarly dangerous condition. In other words, would an ordinarily prudent man have taken extra precautions, or were such precautions taken in this case, are question for the jury."

60 A.L.R., 1106: "Where the evidence shows that a railroad crossing is for any reason peculiarly dangerous, it is a question then for the jury whether the degree of care which a railroad is required to exercise to avoid accidents at crossings imposes on the company a duty to provide some safety device at that crossing."

60 A.L.R., 1113: "The evidence that a traveler's view of an approaching train is obstructed may warrant a finding that the railroad was negligent in failing to maintain gates or some other [576] safety device at the particular crossing in question."

Coles vs. The New York, New Haven & Hartford Railroad Company, 66 Atlantic, 1020; 12 L.R.A., 1067: "A railroad is not negligent in failing to remove or cut down weeds upon its right of way which obstruct the view of the railroad crossing. However, the failure of a railroad to remove those obstructions may be viewed as affecting the nature and the degree of care required of the railroad in the operation of its cars."

In other words, at that particular crossing.

Indianapolis & St. Louis Railway Company vs. Smith, 78 Illinois, 112:

"It is the duty of the railroad to keep its right of way free from obstruction so that persons ap-

proaching on a highway may readily ascertain whether there is danger and the employee in charge of the train may be able to discover whether there is anything on the track, and to permit or to suffer hedges or trees or weeds or anything else to grow upon the right of [577] way or to such a height as to materially obstruct the view, is negligence."

Overbush vs. the Great Northern Railroad, 55—no, let me see. Mattingley vs. the Oregon-Washington Railroad Company, 153 Washington, 514. This, of course, has reference to the matter of charging any negligence against the deceased where there are no independent or no disinterested witnesses, but the crossing here was also a crossing that involved hazards.

Now, 5 A.L.R. (2d), referring to hazardous crossings, 5 A.L.R. (2d), 149, there is a citation of many cases that indicate that the presence of weeds or underbrush or shrubs can constitute a crossing unusually dangerous, and, if so, then the railroad is under the duty to take extraordinary precautions to guard against the dangers of that crossing which might arise in the ordinary operation of the railroad.

154 A.L.R., 227, under the heading "Negligent Speed of Trains at Crossings with Obstructed View":

"Where a railroad has permitted trees or bushes to grow upon the right of way, obstructing a view of the crossing, as well as the view of persons using the highway near the crossing, it becomes the duty of the railroad to use extra [578] precautions to

avoid collisions, as by diminishing its rate of speed or by increasing the warnings given or by keeping a watchman on duty or by using some other sufficient means which may warn travelers upon the highway."

And 154 A.L.R., 227: "In the absence of some extra precaution, such as a crossing gate or a flagman, an obstruction to a view at or near a crossing calls for a lower speed than that which would be possible if the view were not obstructed."

Then *Hubenthal vs. The Spokane-Inland Empire Railroad Company* is a good case on obstruction of view, 97 Washington, 581. In that case they held that:

"To run or to operate a train through a deep cut emerging immediately upon a much used public crossing, where adequate view of the track from the roadway was much obstructed, at anything like 50 miles an hour, with no warning signs save the faint sound of a whistle an instant before reaching the crossing, was palpable negligence." [579]

In other words, there it was the matter of coming out of a cut, but it was an obstructed view of a much-used crossing and an inadequate view, as they have indicated, an inadequate view of the track from the roadway, and here, of course, there was. And they said that coming out onto a crossing of that kind at 50 miles with no warning was palpable negligence.

Now the question here, I don't think there is any doubt that there is an issue made in this case with regard to the matter of an obstructed crossing. You

take and combine the matter of the obstructed crossing, and that is in the Hubenthal case with reference to a traveler on the highway, your Honor, viewing it along with the physical circumstances of the maintenance of this crossing, I think that those are all proper elements of negligence going toward the testimony here that there were no warning signs on either side except this post that shows up on the one side and not on the other.

I think that all of these factors are elements that do two things: They show, first, an obstructed view and indicate in their entirety that because of each one of them, the crossing is of an extrahazardous character to users of the roadway; and that, No. 2, because it is an extrahazardous crossing, each one of those applies in its specific allegation of negligence because each one of them [580] is an element of negligence that creates and imposes, as the Hubenthal case says, the duty upon a railroad to take extra precautions because of them, and they say the failure to so do was palpable negligence.

It is my feeling that those allegations do constitute negligence; that there is sufficient evidence to sustain them in this respect, that they should be submitted to the jury, under proper instructions, and let the jury determine from the conflicting evidence, and I might say this, there has been no conflicting evidence as to the character of that crossing, your Honor. I might say that there has been no conflicting evidence as to the character of that crossing either from the documentary evidence or from the witnesses themselves. And, therefore, I

think that the jury has a right, under the Bradshaw case and under A.L.R., to determine, in other words, if there is one thing wrong, where it did constitute a peculiarly dangerous crossing.

The Court: Another thing that I assume, probably, that I know, but then I want to be sure, what is your position with reference to submitting to the jury the question of contributory negligence on the part of the plaintiff?

Mr. Etter: I don't think that there is a showing at all under the rule, and I have the case on that, the Mattingley case, which is conclusive of that.

Mr. McKevitt: What is the citation?

Mr. Etter: Mattingley vs. Oregon-Washington Railroad and Navigation, 153, Washington, 514. We have cited a couple of other cases there, too.

The Court: 153 what, did you say?

Mr. Etter: 153 Washington, 514. And this is a quotation in that case from Smith vs. Inland Empire Railway Company, 114 Washington, 441:

"Since no one saw the deceased at the time he approached the crossing, and since there was no evidence to show what he did at or before he attempted to cross the railway track, it must be presumed that he used due care. If his engine was running, making a noise, as it no doubt was, and if he approached the crossing and stopped, looked and listened before attempting to make the crossing and did not hear the crossing bell or the approach of the train and did not see it until it was too late to avoid the accident, he was clearly not guilty of contributory negligence."

In other words, they go to this extent there, "It must be presumed that he used due care," and the later [582] case, unless, there is proof by a disinterested witness, unless there is evidence of a disinterested witness, the presumption still carries. I mean, the only proof that is applicable is a disinterested witness and it cannot be found by circumstantial evidence, that cannot overcome the presumption, and that case is cited in the instruction.

The Court: I refer counsel to *Hutton vs. Martin*, 41 Washington (2d), 780, in which that rule has been abrogated.

Mr. McKevitt: Yes.

The Court: Adopting Dean Faulkner's theory that, since the defendant has the burden of proving contributory negligence, it would be a double presumption to instruct the jury. In that case, it was reversible error for the court to instruct on this presumption of due care, and I am in danger of overlooking that at times and I finally got it imbedded in my memory.

Mr. McKevitt: In other words, that decision Mr. Etter refers to has been overruled by the Supreme Court of this state.

The Court: The prior decisions were overruled in *Hutton vs. Martin*.

Mr. McKevitt: Well, then, there is another very apparent reason why he can't invoke the doctrine of the presumption of due care. In his instruction on the last [583] clear chance, he has told the Court to advise this jury that the driver of that truck

was negligent, because last clear chance implies negligence on the part of the party invoking it.

Mr. Etter: We both understand, Mr. McKevitt, that we can submit instructions on alternative rules of evidence. You know, as well as I do, I am not bound by that, as you well know.

The Court: I will hear you, Mr. McKevitt, on your points.

Mr. McKevitt: Well, I think if I understood your Honor correctly, you asked counsel to address himself to all of the subdivisions of Paragraph VI of the complaint with the exception of (d) and (e); is that correct?

The Court: Yes, you had already discussed those.

Mr. McKevitt: Well, for the purpose of the record now, I move the Court to withdraw from the consideration of the jury Subdivision (a) of Paragraph VI, for the reason and upon the ground that there is no evidence of a probative value or substantial value to submit that issue to the jury.

The same motion is made separately as to Subdivision (b) of Paragraph VI—

The Court: Pardon me, you hadn't finished your motion. [584]

Mr. McKevitt: The same motion is made with reference to Subdivision (b) of Paragraph VI.

The Court: I think we have been overlooking here, I assume you want to direct a motion to Paragraph VII, too?

Mr. McKevitt: Yes, I am going to.

The Court: The issue of wanton misconduct.

Mr. McKevitt: Yes, I am coming to that, your

Honor. This is Paragraph VI. If he had proved that, the man would have to go to jail.

The defendant makes the same motion with reference to Subdivision (c) of Paragraph VI and for the same reasons.

The defendant makes the same motion with reference to Subdivision (d) and for the same reasons, and for the additional reason that there were sufficient crossing signals, under plaintiff's own evidence, given to have apprised this girl of the approach of this train in time for her to have avoided the injury, and for the further reason she was specifically instructed by her father before she left the farm to watch out for trains.

The defendant makes the same motion with reference to Subdivision (e) of Paragraph VI and for the same reasons.

The defendant makes the same motion with reference to Subdivision (f) and for the same reasons, and for [585] this additional reason: Counsel has talked a great deal about this being an extrahazardous crossing and a dangerous crossing, and one of the reasons assigned for that is this, that we had permitted an accumulation of weeds and trees and brush on our right of way. Now, so far as the evidence in this case is concerned, your Honor, there is no evidence here that our right of way is wider than the outside ties on either side of that rail. Now, I know that that is not the fact, that we have a wider right of way, and I know what the right of way is. But when Mr. Adams was testifying in this case, he was never asked what is the width of

the Northern Pacific right of way there and the jury has no right to speculate that it extends beyond the ends of the ties.

The Court: I think that might have a bearing on the question of the direct allegation of your negligence in failing to keep your right of way clear, but wouldn't it be true that, regardless of whether extrahazardous conditions were of your making or not, if they were there so as to make it especially hazardous, then it might impose on you the duty of taking special precautions, such as the special signal devices?

Mr. McKevitt: I see your Honor's point, but this takes us into the question of whether this is an extrahazardous crossing. [586]

The Court: That is another point.

Mr. McKevitt: Very well.

The defendant makes the same motion with reference to Subdivision (g) and for the same reasons, and for the additional reason that, assuming the crossing to have been in the condition that plaintiff claims it to have been in and that it was in a bad condition and that we were negligent in permitting it to get into that condition, in the absence of any testimony that that crossing had something to do with causing this truck to stall, then it has no place in this lawsuit.

Now, there is no witness, apart from the railway employees, that testified in any respect with reference to the approach of that crossing, and there certainly isn't anything in the testimony of Mr. Scobee or Mr. Williams from which the reasonable

inference could be drawn that that drop contributed to or caused the stalling of that car.

Now, the defendant moves the Court to withdraw from the jury's consideration Subdivision (a) of Paragraph VII, and that is where he charges us with:

"* * * intentionally, and with a reckless indifference to injurious consequences probable to result therefrom, drove said train at a speed between 70 and 80 miles [587] per hour * * *"

The Court: I don't want to prevent you from making what you consider as an adequate record here, Mr. McKevitt, but all of those under VII pertain to wanton misconduct and I wondered if you couldn't group your objection, simply object to all of them?

Mr. McKevitt: Move that they be withdrawn.

The Court: Because I neglected to ask counsel about it, but my present inclination is it doesn't warrant submission of wanton misconduct and, of course, they all come under that heading, (a), (b), (c), (d).

Mr. McKevitt: I don't know, does (d) VII come under a charge of wanton negligence? I don't think the term "wanton" is used in that.

The Court: (Reading):

"(d) Defendants wantonly maintained the said crossing * * *"

Then the heading of it is that Erna Mae Everett's death was further caused by wanton misconduct.

Mr. McKevitt: Oh, I see.

The Court: In the following particulars.

Mr. McKevitt: Very well, then, I will content myself with moving the Court to withdraw from the jury's consideration all of the allegations of negligence contained in Paragraph VII. [588]

The Court: Yes. To be accurate, I don't want to be too technical, but to be accurate, they are not grounds of negligence, because wanton misconduct is not negligence. That has been definitely stated by the Supreme Court of this state. It goes beyond negligence, intentional harm.

Mr. McKevitt: Yes. There is a recent decision on that use of those terms—wanton misconduct is not negligence. When I first saw that, I thought, well, that is a peculiar statement; when you analyze it, you can see what it is.

Very well. Now I want to address myself to this question of the last clear chance doctrine. Of course, as I have indicated, I do not believe, in the absence of expert testimony on the part of the plaintiff, that there was an issue made for the jury. However, counsel, I don't believe, will quarrel with me, and I know the Court knows it to be the law under the decisions of this state, that the question of the application of the last clear chance doctrine, in the first instance, is a question of law for the Court. I could get your Honor that pronouncement, but I know that you know it is the fact.

The Court: Yes.

Mr. McKevitt: Well, if that is true, it is my position then that either the first phase applies or the second phase applies, and it isn't up to the jury

to [589] determine which one applies; it is my candid opinion, under the decisions of the Supreme Court, that your Honor has got to determine that; because if you have to determine, in my view, the application of the doctrine, if as in this state, different than Idaho where they only have the one branch, here we have two, if you have to determine the application of the doctrine and it has more than one branch, then I think the duty is imposed upon the Court to determine which branch of the doctrine applies, and the jury is not permitted to determine that question.

Now, on the question of whether or not this is an extrahazardous crossing, of course, we have to, I think, take into consideration first the very important factor that this girl had knowledge that this was the main line, the knowledge that she had of the existence of the crossing, and the knowledge that she had of the passage of that train over that crossing every afternoon about that time.

Now, when you come to determine what an extrahazardous crossing is, our Supreme Court had never defined that until the case of *Hopp vs. Northern Pacific* in 20 Washington (2d) at Page 439. That was the case that was permitted to go to the jury down in Lincoln County, a verdict of \$26,000 was returned against the railway company, and reversed outright in the Supreme Court, and in that case it was urged that this was an extrahazardous crossing. [590]

The Court: It was in the city limits of Davenport?

Mr. McKevitt: Yes.

The Court: That case?

Mr. McKevitt: Yes. He was a barber at Harrington, Jake was. (Reading:)

“The respondent alleged that the crossing was extrahazardous and that the appellants were negligent in failing to keep a watchman or automatic signal alarm bell at the crossing. The deceased was familiar with the crossing and had a clear and unobstructed view of the track, in the direction from which the gas motor coach was approaching, of from 1,000 to 2,800 feet when he was at a distance of one hundred feet from the crossing. In *Missouri K. & T. R. Co. vs. Long*, 299 S.W. 854, the court held that a crossing is more than ordinarily dangerous if it is so peculiarly dangerous that prudent persons cannot use the same with safety unless extraordinary means are used to approach such place. The crossing was not an extrahazardous one, as a matter of law, under the facts of this case.” [591]

And I say that the crossing that we have here falls within that definition.

Now, counsel makes a statement, he says, “I don’t think there is any dispute between us here as to what the conditions at that crossing were with reference to its being,” as he characterized it, “‘an obstructed crossing.’” Now, I don’t go along with him on that and I say that those two panoramic views, and particularly the view that is shown, the camera 180 feet from that crossing, anyone looking at it from that point, sitting in an automobile when 180 feet from that crossing, can see that viaduct

unless these are doctored photographs. And you can see the rails at different points along there. If your Honor will observe the points, you can see the rails of the track. Now, when you take the one that is 25 feet from the crossing, how anyone can contend that that is an obstructed crossing by way of weeds and brush is beyond my ability to comprehend.

Now, of course, there was some duty on the part of this girl to make sure that a train was not approaching. Now, counsel has been down there and he has been at this crossing and so have I, but relying on these photographs, and I don't care what the angle of that road is, namely, that it doesn't approach that railroad at right angles, even if it approached at as sharp an angle as this and the [592] train is coming from that direction, when she is 15 feet from that crossing all she has to do is turn her head in that direction and there she has got a clear view of that train. I suppose there was attempted to be developed here through the testimony, well, you can't see the train until you get pretty close up to the crossing, until you are almost on the crossing. Well, your Honor knows from these photographs that that is not true, and I don't care what the testimony of individual witnesses may be, when the uncontroverted facts speak as clearly as they do in this case, no person is going to be held to say something that is in direct contraversion of these facts.

The other proposition is that, as your Honor well knows, they not only must look and listen, but

they must look from a point where looking, they can see, and listening, where they can hear.

The Court: I think we must bear in mind, too, the distinction between city crossings and country crossings.

Mr. McKevitt: Yes.

The Court: The volume of traffic is something that enters into it, where you have a stream of traffic moving constantly and continuously, such as you would have perhaps on North Division, you have got one situation; you get out in the country where you have a country road crossing and also a positive duty enjoined on motorists crossing [593] country crossings to maintain a speed at which they can stop within ten feet of it.

Mr. McKevitt: That's right.

The Court: So that I think the two situations have to be considered in different circumstances.

Mr. McKevitt: Yes. And the absolute right of way, that while the rights are relative, the duties are relative at a crossing, your Honor well knows the Supreme Court has said a hundred and one times that we have the right of way and it must be accorded to us. And I think that under the evidence in this case, it is my view——

The Court: Of course, it has no bearing here, but it just aroused my curiosity as to just what agency is it that determines whether or not you shall maintain special safeguards at these crossings other than in a city? Does the Interstate Commerce Commission or a state agency?

Mr. McKevitt: No, that is going back now, that

question did come up in the Hopp case, and Judge Schwellenbach, Ed Schellenbach was the trial judge, he came over from Ephrata, and we had that up there, Mr. Kelley was on the other side, and it is my recollection now that with reference to the establishment of these mechanical devices, the procedure generally is that the residents of the area will petition the county commissioners and the county commissioners then petition the Department of Public [594] Service and then there is a hearing held with the railway company.

The Court: I don't want your attention diverted too much from the issues here.

Mr. McKevitt: That is the way that is arrived at.

Well, I have nothing further to say in this regard, unless I have left myself unaddressed to some problem.

The Court: I can think of nothing, no.

Mr. McKevitt: Very well.

The Court: Do you have anything further?

Mr. Etter. Yes, I have just one or two things to say, your Honor.

In the first place, the Hopp case is referred to in the Bradshaw case and the railroad made a very vigorous argument here on this matter. They said that mathematically it was definitely certain, and the court, referring to the number of these cases, the Hopp case, says that while these cases all resulted from grade crossing accidents, none of them involved the situation like that presented here and each case of this type must be considered in the

light of its own particular facts. Then they go on and say, furthermore, that:

“Nor did the court err in refusing to hold, as a matter of law, that Mr. Bradshaw’s [595] negligence was the sole proximate cause of the accident. It is argued that the ‘physical facts’ speak with such force as to overcome all testimony to the contrary.”

Then they talk about the 26 photographs taken at different angles and distances and an example of the railroad asserting conclusively that:

“***a driver approaching the crossing from the south could, when 250 feet from the rails, see a locomotive on the spur track 157 feet northeast of the pavement.”

They say: “The problem is not that simple. There was no evidence that the locomotive was within 157 feet of the pavement at the time Mr. Bradshaw was 250 feet from the crossing. The speed of his car and that of the locomotive, their relative positions just prior to the accident, and the amount of obstruction to the view, were all matters of dispute.”

And, therefore, the court properly declined to rule, as a matter of law, that he was contributorily negligent. [596]

Now, counsel points to these photographs, your Honor, talking about disputes, points to these photographs, and yet you can take two more of them over here and here is a camera placed at 350 feet east of the crossing facing westward and you look down at the crossing, and that is within 350 feet, you can’t see a thing back here. And you take

this one, which is 300 feet, you move it down 50 feet more, and you can see the top of a car. Now, that is the first time you can see the top of a car. The Hopp case, it was absolutely flat and within 100 feet he could see over 1,000 feet. And there is another thing that we haven't got in any other case, we have an overpass coming over at an angle over the top that obstructs this view because of the angle, so that a person getting up here within 25 feet, even on his photograph, can't see through but only to the mouth, which would be a total of less than 600 feet, even from 25 feet, is all that could be seen; that is, if you are up in a position where you can see. It isn't that where you are up an ascending grade and looking to your right. In other words, these other cases didn't have the example of an overpass that obstructed from view and obstructed, as a matter of fact, from the trainman's view himself until he came under that underpass unless the car was directly on top of the crossing.

So that the obstruction in the Hopp case being over, as they say, way over 1,000 feet and the level approach, all of those things, none of them would apply here, and, as in the Bradshaw case, there are more things in dispute here than the few things they mentioned in the Bradshaw case.

Now, I don't know whether your Honor wants to hear me on this matter of last clear chance, but if there are any questions that you have, I will go into it.

The Court: Well, I think I have the view there that, while I agree with Mr. McKevitt that it is a

question for the Court to decide as a matter of law——

Mr. Etter: That's correct.

The Court: ——whether the doctrine shall be submitted, the Court doesn't assume the functions of the trier of the facts and try factual issues in order to determine whether it shall be submitted or not, and, if there is evidence which the jury could believe on both theories, I think both should be submitted, because a jury might believe one or the other, I can't tell.

Mr. Etter: That's correct.

The Court: I don't know what they will adopt factually.

Mr. Etter: Your Honor has no question, then?

The Court: Yes, I think it should be given.

Mr. McKevitt: Just one other observation I wanted [598] to make with reference to Mr. Etter's contention as to view.

Now, the only testimony that we have here about how far you can see down that track is the testimony of the the engineer and the fireman. The engineer says that when he was six or seven hundred feet or more, he saw this truck 25 feet from the crossing. Well, if he could see the truck that distance from the crossing, certainly the driver ought to be able to see the train. If one can't see the other, the other can't see it.

Mr. Etter: Oh, no, that doesn't follow. A man sitting up 15 feet looking down and somebody sitting in a panel truck trying to look up through the brush.

Mr. McKevitt: With a Diesel cab fourteen and a half feet above the top of the rails and the rails above the level of the road?

Mr. Etter: Yes, and the passenger is in a seat of a car two feet above the ground.

The Court: Well, I think that we have had this matter thoroughly discussed and——

Mr. McKevitt: That is the jury argument we are talking about.

The Court: It is always a difficult problem for a trial judge to determine what issues to submit to the jury, because no judge wishes to deprive a litigant of his right to trial by jury on any issue that is made by the facts, [599] and, yet, it is the responsibility of the court to see that issues are not submitted that are not substantially supported factually. Did you have something further?

Mr. McKevitt: Except for the purpose of the record, I don't know what your Honor's ruling is on my separate motions with reference to the subdivisions.

The Court: Oh, yes. Well, I am just announcing it.

Mr. McKevitt: I see, pardon me.

The Court: My introduction must have been a little remote.

What is it, Mr. Connelly?

Mr. Connelly: Your Honor indicated that he didn't lay much credence to Paragraph VII of the complaint with reference to wanton negligence, and to shorten this up because of the——

The Court: Wanton misconduct.

Mr. Connelly: Wanton misconduct. Excluding Subdivision (a), I would like to speak briefly on Subdivision (b) thereof.

The Court: All right.

Mr. Connelly: Which refers to the failure to blow the whistle at the approach to the intersection.

“A wanton act” has been set out in the instruction as one which is performed intentionally with a reckless indifference to injurious consequences probable to [600] result therefrom. It must be under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be conscious, from his knowledge of such surrounding circumstances and existing conditions, that his conduct will in all common probability result in injury.”

Now, what I wish to point out to the Court was this:

In the condition of the evidence as it stands now, Scobee, the engineer, testified that he first saw the girl and applied his service application of the brakes and at that time the girl in the car was some 25 feet south of the O'Neill Crossing. Now, that is borne out by the speed tape which was introduced into evidence and which was described by Mr. Gaynor, and Mr. Gaynor said the speed tape indicates a service application of the brakes and a letting up of the service application of the brakes one-half mile back from the point of impact or, in other words, a distance back of at least 2,600 feet. In other words, taking the engineer's testimony that

he saw the girl 25 feet back, he made a service application, he saw the car start to stop, he took off the service application and let the train regain speed; couple that with Gaynor's testimony that this all happened 2,600 feet back, in other words, 1,300 feet back of the whistle stop, that, together with the O'Neill [601] testimony that there wasn't any whistle until the train started emerging from the underpass, would indicate that this man plainly and clearly saw the girl 1,300 feet prior to the whistle post, but didn't blow the whistle until he was within some 600 feet of her.

This statute that requires the blowing of the whistle 80 rods back is, of course, a misdemeanor and is punishable as such, and I think the jury, considering those facts, as they, of course, have a right to do, could easily find a wanton act on the part of the engineer, who, traveling in a train some 60 to 64 miles an hour, seeing a car approaching a crossing in excess of 2,600 feet back, approaching the whistle stop 1,300 feet back, and doesn't blow the whistle at all there, brings us, at least for argumentative purposes and so far as the complaint goes, within the meaning and definition of a wanton act with reference to Subdivision (b).

Mr. McKevitt: If the Court please, if that argument is true, we would have that train go 100 miles an hour to meet that automobile on the crossing.

Mr. Connelly: You are assuming the automobile was on the track for a given length of time, which, of course, is another question for the jury.

The Court: All right, go ahead, Mr. Connolly.

Mr. Connolly: Furthermore, with reference to Subdivision (c) [602] thereof, if we follow the same line of reasoning and we apply the same set of facts, and quoting the language here, that the engineer,

“***with reckless indifference to injurious consequences probable to result therefrom, failed to reduce the speed of said passenger train by applying full and sufficient braking power***”

There, again, I submit we have the same argument that is applicable to Subdivision (b) with reference to the whistle. I think when you are dealing with a punitive statute, when you have the engineer admitting that he saw the girl in excess of 2,600 feet, that there is testimony that he didn't blow the whistle at the whistle post, surely the jury has a right at least to the instruction on the wanton act.

That is all I have on that, your Honor.

The Court: Well, as I started to remark, it is a difficult thing to decide just what issues to submit to a jury in a case of this kind which is close on the evidence, and, as I say, I think perhaps courts sometimes are a little inclined to lean over backwards to be sure that the parties have a jury trial on every issue on which a reasonable inference might be drawn.

And it is perfectly natural for counsel to sell themselves on their own cases; that is what a good advocate [603] should do. He may over-sell himself and there is no danger in that, but there is danger

if he over-sells the court, particularly so on the part of plaintiffs.

I have had the rather unpleasant experience within the last month of having two big plaintiffs' verdicts set aside and reversed in the Court of Appeals, and that is a heart-breaking experience for a plaintiff.

And here, just from my experience as a judge and my evaluation of Washington law—and, of course, in this case, as Justice Frankfurter says, in a diversity case, a Federal judge is simply, in effect, another judge of the state; he has to apply the state law, and he has no power to make state law, but he has the duty of correctly interpreting it and applying it—and, of course, I could be wrong and frequently am, but in my judgment, anyway, if the plaintiff got a verdict in this case which under my instructions could be based on the failure of the defendant railroad company to maintain a watchman at this country road crossing, I don't think it would be worth a nickel, or, perhaps, being more practical, I should say it would be worth no more than what the railroad company thinks it would cost them to appeal.

And so that I do have a responsibility here of protecting the plaintiff, as well as the defendant, in the matter of submitting issues to the jury. And with that [604] thought in mind, I don't believe here there is any evidence of excessive speed, there is no statutory speed limit at a railroad crossing, and where a highway crosses a railroad grade, the railroad company has the right of way. It is the

duty of people who approach to stop, look and listen. It is their duty to see and to give the right of way to the train. And this applies to this matter of wanton misconduct, also, that the engineer driving his train down that track has the duty of maintaining a schedule. The railroad company doesn't have to stop and slow at each crossing. If they did, their traffic would be greatly impaired, against public interest, so that the engineer has the duty of maintaining his schedule and he has instructions to maintain his speed, unless something develops that warrants his slowing down, so that he has the right to assume when he approaches a crossing and he sees the vehicle approaching it, he has the right to assume, until the contrary clearly appears to him, that the vehicle will stop and give him the right of way.

So that even though he might see the vehicle back at 1,300 or some other feet, he has the right to assume that that vehicle will stop, as the law requires it to do, and give him the right of way, and it is only when the contrary appears that he is thrown into that emergency, that a duty arises on him to act. And it would certainly be a [605] peculiar application of the doctrine of wanton misconduct to say that when, at the last minute, he sees that somebody, contrary to what he has a right to expect, has gotten in trouble on that track and has got stopped there, that then he would be guilty of reckless disregard of consequences and wanton misconduct even if he did fail to act in a reasonable and prudent manner in that situation. He

might be guilty of negligence, but certainly, I think, he would not be guilty of wanton misconduct.

Now, I think I have indicated my view here pretty much. I don't think that this crossing has been shown to be a peculiarly dangerous crossing, country crossing, as the Supreme Court of this state has defined that, that prudent persons must use extraordinary precautions in approaching it. There has been a good deal of testimony here as to how difficult it was to see a train coming down that track, but most of that, I think, in the light of these photographs, was the angle of approach, which meant that if the driver didn't turn his head around, he couldn't see the train. There isn't any evidence here, and I think this 30 and 31 almost demonstrate that a person approaching that crossing could see the top of a Diesel engine, 14 and a fraction feet above the rails. What we are concerned with here is not that someone approaching this crossing could see the rails and both the rails all the way down the track, but that they [606] could see the train was coming, and they can see a train is coming if they can see the top of it, which is 14 feet high.

And the failure to maintain the brush here, I don't think there is any evidence sufficient to submit that to the jury, because we don't know where the railroad company's right of way was, and it isn't shown here that the brush really obstructed the view of the train or a Diesel 14 feet high.

Now, without taking the time to go into much detail here, I propose to submit to the jury—and,

of course, your objections will stand to this, Mr. McKevitt; I think you have made a clear record of that; and, of course the objection of counsel for the plaintiff to my not submitting is clear, I think—I propose to submit Subdivision (d) of Paragraph VI——

Mr. McKevitt: (b) ?

The Court: (d)——a, b, c, d—which is failure to sound the whistle as required by statute.

Mr. McKevitt: I see.

The Court: And Paragraph (e), which is the last clear chance, and Paragraph (g), which is negligently failing to maintain proper and safe level of the rock and cinder ballast, and so on. I think that I had a great deal of difficulty with that ground of negligence, but I think [607] that the jury could draw a reasonable inference, not only from the plaintiff's testimony, but also the testimony of the engineer, that the car "bucked" up onto the planking, and I think the reasonable inference might be drawn that it was thrown into a buck by the peculiar situation there where the planking is five inches or so above the gravel and there was a sharp jump-off. Anyway, I have come to the conclusion that a reasonable inference might be drawn there.

Other than those three grounds of negligence, the motions of the defendant will be granted. And I have also come to the conclusion that while, of course, the question of contributory negligence of the deceased should be submitted to the jury, that the question of contributory negligence of the par-

ents should not be; that that issue will be withdrawn from the jury.

Now, although it is late here, rather than take the time at 1:30 after the jury comes in here, I think I will inform counsel as to what my position will be with reference to their requested instructions. What my position will be has been indicated as to a good many of them by the rulings on the motions, I think.

(Whereupon, the Court advised counsel as to the instructions to be given to the jury.)

The Court: Court will recess until 2 o'clock.

Jury Instructions

The Court: Now, gentlemen of the jury, it is time for me to instruct you as to the rules of law that you are to follow here in your deliberations in this case.

I wish it were possible for me to just in a few words in a conversational way, as I am now, tell you how you are to decide this case, what the rules of law are, but unfortunately it is not that simple. We have some rather complex situations develop. The relative rights of users of the highway and railroads where highways cross the railroad tracks is not a simple matter, some of the rules are rather technical, like this "last clear chance" doctrine that you have heard about, and it is my duty to instruct you fully and as accurately as I can on **what these** rules of law are and to try to assist you in applying them to the facts and to the case as they come to

you from the witnesses and the documentary evidence.

I think it might be helpful to you at the outset, however, if you bear in mind that, as I told you at the beginning of this case, it is the sole duty and responsibility of the jury to find the facts; it is the sole duty and responsibility of the Court to tell you the law, to announce to you the law that is to apply to these facts.

Now, where there is a conflict, as there usually is, [609] in the facts in a case of this kind, where each side has its own theory as to what the facts are and as to how the particular accident happened, then I must instruct you on both theories, because I have no right to assume which one you will adopt. So that these instructions that might, offhand, seem to you to be contradictory and confusing, I think are not really so if you regard them analytically and remember that I am trying to tell you, if you find the facts as contended by the plaintiff, you should do so and so; if you find the facts as contended by the defendant, you should do so and so; so that I try to meet both situations in the instructions as to the law that I shall give you.

Now, at the outset, let me say I am going to define these terms for you and go into much detail later on in my formal instructions, many of which I have written out for the sake of completeness and accuracy, but what we have got basically here is that a girl was killed at a railroad crossing. The father, bringing the suit for damages for the loss of his daughter, contends it was due to the negli-

gence or, to use lay language, the fault or blame of the railroad company, acting through its employees, mainly the locomotive engineer, that caused the accident and caused the death of the girl.

The defendant railroad company denies that they [610] were to blame in any respect or negligent, and they say, even if we were, the girl was to blame, she was guilty of contributory negligence, negligence on her part, which bars a recovery at law.

The plaintiff says no, the girl wasn't guilty of contributory negligence, but even if you should assume that she was, we have this "last clear chance" doctrine where if she placed herself, through her own blame, in a position of peril and the engineer on the train saw that or should have seen it in time to avoid the collision or to avoid her death, causing her death, by the application of proper methods, then, nevertheless, the railroad company is liable.

Now, the only contentions here of negligence which you need to regard—I am not going to send the pleadings to you because they are long and contain many things that are not denied—and I will simply say that so far as the plaintiff is concerned here, the contentions that the plaintiff makes that you should consider are that this collision on the railroad track and the death of Erna Mae Everett, the girl involved, and the ensuing damage to the plaintiff, was directly and proximately caused by the negligence of the defendant in the following particulars:

That the defendant neglected and failed to sound the crossing signals required by the statutes of the

State of Washington as the locomotive approached the said crossing, [611] by either blowing a whistle or sounding a bell on the locomotive;

The defendant negligently failed to stop the train, slacken its speed, or give timely or adequate warning of its approach to the crossing, when the persons operating the train saw, or by the exercise of ordinary care should have seen, Erna Mae Everett and plaintiff's panel truck in a position of imminent peril of being struck by the train;

And that the defendant negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden plank-ing at the crossing.

Now, the burden of proof is on the plaintiff to prove these claims or contentions I have just read to you by a fair preponderance of the evidence, because they are denied by the defendant, and the defendant in its answer sets up what we call an affirmative defense and that affirmative defense is that the death of said Erna Mae Everett was caused and brought about solely and alone through her own negligence, which negligence was a direct and proximate cause of the collision which resulted in her death, and the burden of proving that contention by a fair preponderance is upon the defendant, because that contention, that claim, is denied by the plaintiff in his reply. [612]

Now, as I have stated or indicated here, basically this action is one for negligence, and negligence is the failure to exercise reasonable and ordinary

care. By the term "reasonable and ordinary care" is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances and conditions. Negligence may consist of the doing of some act which a reasonably prudent person would not do or in the failure to do something which a reasonably prudent person would have done under the same or similar circumstances and conditions. Negligence is the want of due care or ordinary care in the particular situation. "Due care" and "negligence" are relative and what in one situation might be due care might be negligence in another, and the measure of duty is always reasonable care and caution under the particular circumstances presented.

Now, even though you find the defendant guilty of negligence that proximately caused Erna Mae Everett's death, then, nevertheless, plaintiff would not be entitled to recover damages for the deceased girl's death if the girl herself was guilty of negligence which proximately contributed to cause her death. That is what we call "contributory negligence," and I am not taking into consideration now this doctrine of last clear chance which I will explain to you in detail later on. [613]

Contributory negligence is negligence upon the part of the person for whose death a claim is asserted which proximately contributed to such death, and the term "negligence" in this connection has the same meaning as I have previously defined for you.

The term “proximate cause” of an injury or death, as used in these instructions, is that cause which, in a natural and continuous sequence, unbroken by any independent cause, produces the injury and without which the injury would not have occurred and would not have been sustained.

“Preponderance of the evidence” is the greater weight or convincing power of the evidence. On any issue, the side on which the evidence appears to you to have substantially greater convincing weight or power than the other side has established a preponderance of the evidence within the meaning of that term.

The mere fact that an accident happened in this case raises no presumption or inference of negligence on the part of the defendant. Neither negligence nor contributory negligence is ever presumed, but must be established, like any other fact, by a preponderance of the evidence as I have defined that term to you.

In arriving at a verdict, you will not allow yourselves to be influenced or controlled by any consideration [614] or feeling of passion, prejudice, or sympathy for or against either party to the action, nor will you be influenced or controlled in any way by the fact that the defendant is a corporation. It is your duty, and you are required under the law, to decide the case the same as if the parties to the litigation were natural persons, for all persons to an action are equal before the law and entitled to equal justice.

You are instructed that it is the law of the State

of Washington that every engineer driving a locomotive on any railway who fails to ring the bell or sound the whistle upon such locomotive or cause the same to be rung or sounded at least 80 rods from any place where such railway crosses a traveled road or street on the same level, except in cities, or to continue ringing of such bell or sounding of such whistle until such locomotive has crossed such road or street, shall be guilty of a misdemeanor. Therefore, if you find from the evidence in this case that the engineer of defendant's railroad train, F. W. Scobee, failed to ring the bell or sound the whistle upon defendant's locomotive at least 80 rods east of the O'Neill crossing, and failed to continue the ringing of such bell or the sounding of such whistle until the locomotive had crossed O'Neill Road, such failure would be negligence on the part of the defendant herein, and if such [615] negligence proximately caused the death of Erna Mae Everett, it would entitle the plaintiff to a verdict in his favor, in the absence of contributory negligence on the part of Erna Mae Everett. You will be instructed on the various aspects of contributory negligence later on, and I have given you some instructions heretofore in these instructions.

Now, there is involved in this case what is known as the doctrine of last clear chance. It is permissible to use the doctrine only after you find, and you may not use it unless and until you first find, that in the events leading up to the accident in question, both the deceased and the defendant were negligent.

The doctrine of last clear chance is divided into two phases to cover two separate possibilities: (1) that where the defendant actually saw the peril of the traveler on the highway and should have appreciated the danger and failed to exercise reasonable care to avoid injury, such failure made the defendant liable, although the traveler's negligence may have continued up to the instant of the injury; and (2) that where the defendant did not actually see the peril of the traveler, but by keeping a reasonably careful lookout, commensurate with the dangerous character of the agency and the locality, should have seen the peril and appreciated it in time, by the exercise of reasonable care, [616] to have avoided the injury, and failure to escape the injury results from failure to keep that lookout and exercise that care, the defendant was liable only when the traveler's negligence had terminated or eliminated or culminated in a situation of peril from which the traveler could not, by the exercise of reasonable care, extricate himself.

Therefore, if either of the two conditions just mentioned are found by you to have existed with respect to the collision in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injuries suffered by the plaintiff, that is, on account of the death of Erna Mae Everett in this case, and proximately resulting from the accident, despite the negligence of the deceased.

I further instruct you, however, that the doctrine

of last clear chance contemplates a last clear chance, and not a last possible chance. It implies thought, appreciation, mental direction, and the lapse of sufficient time to act effectively upon the impulse to save another from injury. There must be an appreciable interval of time intervening between a collision and the moment when the engineer of a train has knowledge or notice of the danger in which the other party has been placed.

Now, under the laws of this state, the railway company has the right of way over a motorist at a crossing such as here involved, that is to say, a crossing at grade, and the driver of a motor vehicle is legally required to accord such right of way to an approaching train when both automobile and train are approaching the crossing simultaneously.

Under the law of the State of Washington, any person operating an automobile shall, upon approaching the intersection of any public highway with a railroad crossing, reduce the speed of such automobile to a rate of speed not to exceed that at which, considering the view along the railway track in both directions, such automobile can be brought to a complete stop within ten feet from the nearest track in the event of an approaching train.

If you find from the evidence in this case that Erna Mae Everett, the operator of the vehicle, violated the above provision of the law of the State of Washington, and if you further find that such violation was the direct and proximate cause of

her death, then your verdict should be for the defendant, unless, of course, you find for the plaintiff under the last clear chance doctrine which I have defined for you.

Now, if you find from the evidence that the train and automobile were simultaneously approaching the crossing in question, then the operators of the locomotive and [618] train had a right to assume, until the contrary became evident, that Erna Mae Everett would give the train the right of way, and the engineer was not required to attempt to slow or bring to a stop his train because the automobile may have been approaching the track.

It is the law of the State of Washington that a railroad crossing is a proclamation of danger in and of itself, and that those who propose to enter or do enter its zone must govern themselves accordingly. It is the positive duty of the traveler approaching a railroad crossing to look and listen, and this observation must be made from a position where looking and listening would be effective.

If you find from the evidence that the decedent, Erna Mae Everett, did not look or listen from a point where such would be effective, she was guilty of negligence as a matter of law, and if you further find that such negligence was the proximate cause of the accident, then your verdict must be for the defendant, disregarding again, of course, the last clear chance doctrine which I have heretofore defined to you.

If, under the physical facts in and about the crossing, the deceased Erna Mae Everett saw or

should have seen the approach of the defendant's train before her car entered on and stopped on the crossing, it was her duty to watch the advancing train. I further instruct you that [619] such duty is not performed by going forward blindly. It was the duty of the deceased, in the operation of her automobile, to look before she entered the danger zone. If, under the evidence, you find she knew, or in the exercise of reasonable care should have known, that she was entering such a danger zone and that the defendant's train was likewise approaching the danger zone, she had no right to rely on the presumption that the servants of the defendant railway company would attempt to stop or slow the speed of their locomotive and train in order to avoid an imminent collision.

Now, gentlemen, you are the exclusive judges of what is the evidence in this case and of the weight and credit to be given to the testimony of each witness. In doing this, you may take into consideration the conduct, appearance, and demeanor of each witness: the apparent candor and frankness or want of those qualities: the reasonableness or unreasonableness of the story told by the witness, its probability or improbability measured by your own experience in life; the interest or lack of interest on the part of the witness in the outcome of the case; and, in short, all the facts and circumstances disclosed from the witness stand; and in the light of all the circumstances, you are to give the testimony of each witness that fair and reasonable weight which in your particular judgment as [620] per-

sons of common sense it appears to you to be reasonably and justly entitled to receive.

A witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony. If the jurors believe that any witness has thus been impeached or discredited, it is their exclusive province to give the testimony of that witness such credibility, if any, as they think it may deserve.

Now, inconsistencies or discrepancies in the testimony of a witness or between the testimony of a witness in the trial and a statement made before the trial or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. You should bear in mind that two or more persons witnessing an incident or transaction may see it differently, and innocent misrecollection, like failure to recollect, is not an uncommon experience.

In weighing the effect of any discrepancy, the jury should consider whether it pertains to a matter of importance or an important detail and whether the discrepancy results from innocent error or willful falsehood. You should be slow to conclude that any witness has wilfully testified falsely to any material matter, but if you do so conclude, you are at liberty to discredit the entire testimony of such witness, except in so far as it may be corroborated by other credible evidence.

Now, I have no means of telling, of course, what your verdict will be, but it is my duty to give you

an instruction on the measure of damages in case you should find for the plaintiff. My giving you this is not any indication or hint on my part as to what I think you should do. I am simply giving you this instruction as to the measure of damages in case you should reach the point where you need or require it.

You are instructed that should you decide from the evidence that the plaintiff is entitled to damages for the loss of his minor child, you will give consideration to the following as a measure of damages to be awarded:

You shall determine the value of the services of this child from the date of her death until she would have attained the age of majority, less the cost of her support and maintenance to her parents during this interval. In determining the value of the deceased child's services, you must take into consideration the child's health, her mental and physical capacity, both present and prospective, as well as the situation of her parents. In determining the value of the deceased child's services, you should not consider any distress, sorrow, or mental suffering of the parents caused by the death of the child. You may also [622] consider what expenses may have been incurred as shown by the evidence by the plaintiff for funeral expenses as the result of the death of the child.

Now, in arriving at your verdict, you are not permitted, if your verdict is for the plaintiff, to add together different amounts representing the respective views of different jurors and to divide the total

by twelve or by some other figure intended to represent the number of jurors involved. Any such figure would result in a quotient verdict and would be contrary to law and would be in violation of your oaths. You are, of course, to give consideration to each others' views and reasoning and honestly endeavor to reach a verdict, but such common agreement is to be based upon the final honest belief of the jurors and must not be arrived at by any mechanical process of addition and division, which constitutes what we call a quotient verdict.

Now, when you retire to the jury room to consider your verdict, you will elect one of your members as foreman. It will be his duty to preside over your deliberations on your verdict and to represent you as spokesman in the further conduct of the case in court. And you will take with you to the jury room all of these exhibits which have been admitted in evidence and forms of verdicts which have been prepared for your convenience. [623]

The forms of verdict are very simple and will, I am sure, give you no trouble. They have the caption of the case and then one of them, "We, the jury in the above-entitled case, find for the defendant;" the other, "We, the jury in the above-entitled case, find for the plaintiff in the sum of \$....." You select the verdict, the form of verdict, that is in accord with your conclusion. And it will be necessary for all of you to agree to return a verdict; in other words, the verdict must be unanimous; and when you have all agreed upon a verdict, then the foreman will sign it and you should notify the bail-

iff that you are ready to return your verdict in court. I will excuse the jury——

Mr. Etter: Your Honor.

The Court: Yes?

Mr. Etter: You prefaced your instructions by stating that in the pleadings that one of the allegations of negligence was the failure to maintain the crossing in better condition, but you did not instruct on it.

The Court: I will ask the jury to step out just a moment, please.

(The following proceedings were had in the absence of the jury:)

The Court: What you have reference to, I suppose, [624] is Subparagraph (g) in Paragraph VI of the complaint, isn't it?

Mr. Etter: Yes, your Honor. In other words, I felt——

The Court: I don't believe any request was submitted on that, was it?

Mr. Etter: Yes, there was a request submitted on it, but it was under the wanton misconduct and your Honor indicated he wasn't going to give that instruction, but your Honor did indicate that he was going to give an instruction that covered (g), so we didn't prepare one, although I can certainly do it in about two seconds, but I thought your Honor was going to instruct on that.

Mr. McKevitt: Did you request that, Max?

Mr. Etter: Yes, we requested it under the wanton misconduct, yes.

Mr. McKevitt: You didn't request it on a specific instruction on defective planking.

The Court: The reason I overlooked it was it wasn't submitted as a request based on negligence.

Mr. Etter: That's right.

The Court: The only one you submitted was based on wanton misconduct.

Mr. Etter: We didn't get one out because I thought your Honor indicated he was going to instruct on that. [625]

The Court: Have the jury come back in.

(The following proceedings were had in the presence of the jury:)

The Court: Gentlemen of the jury, I overlooked one claim of negligence here of the plaintiff, and on that point I instruct you that if you find from the preponderance of the evidence that the defendant railway company negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking at the crossing, and you find that that negligence was the proximate cause of the death of Erna Mae Everett, and you further find it appears that there was no contributory negligence on the part of Erna Mae Everett, then your verdict should be on that point for the plaintiff.

I want to say this, in this connection, that because this particular matter was overlooked in the instructions and given separately, don't overemphasize or give it any special importance. It is just the fact I inadvertently overlooked it.

Now I will have the jury retire for further proceedings.

(The following proceedings were had in the absence of the jury:) [626]

The Court: In the absence of the jury, counsel may now take exception to the Court's instructions or failure to give proposed instructions.

Mr. Etter: Plaintiff has no exceptions to the instructions.

Mr. McKevitt: May it please the Court, the jury not yet having retired to consider of their verdict, the defendant now takes the following exceptions to instructions given by the Court:

The defendant excepts to the giving of the instruction on the last clear chance doctrine for the following reasons:

Under the evidence in this case, or more particularly by virtue of the lack of evidence in this case, there was no issue to submit to the jury with reference to the application of this doctrine.

The defendant further excepts to the instruction given, in that since under the law of the State of Washington the question of whether or not the last clear chance doctrine applies is one to be determined, in the first instance, by the Court, that if the Court felt that one or the other branches of the doctrine should be submitted, then under the decisions of the Supreme Court of the State of Washington, the Court should have eliminated one of the two branches of the doctrine and submitted but one of the [627] branches.

The defendant excepts to the instruction of the

Court touching the allegation of negligence concerning the defect in the crossing itself and the roadway leading thereto for the reason and upon the ground that there is no evidence in this case to justify the submission of that issue to the jury, because, even assuming that there was some defect in the planking of the crossing, there is no evidence in the case that this defect, if it existed, was the cause of this truck stalling on the crossing.

Further objection is made to that instruction because the language of it includes the duty of the railway company to maintain the roadway leading up to the crossing, which might leave the jury under the impression that the defendant was under the duty to maintain that roadway and not a particular portion of it. In other words, what I have in mind there, your Honor, was that it should be limited to the immediate approach of the roadway to the crossing.

The defendant excepts to the refusal of the Court to give its instruction—I have got mine numbered 8 here, I don't know whether it is No. 8 or not, but at any rate it is the instruction that was requested in connection with the fact that the young girl did not have a driver's license.

The Court: Yes. [628]

Mr. McKevitt: The position of the defendant is this, that under the laws of the State of Washington, it was negligence per se on the part of the father to have permitted this girl to drive a car without an operator's license issued by the State of Washington, and the evidence would have been, had

the defendant been permitted to prove it by the cross-examination of the plaintiff, that the girl did not have a license, as indicated in the defendant's offer of proof, the objection to which was sustained.

The Court: I don't think you numbered your proposals, but I have in mind what you mean but I wonder if the record sufficiently shows it. You made a proposal on that, didn't you?

Mr. McKevitt: Yes.

The Clerk: Your Honor, I numbered counsel's original requests.

The Court: Numbered their originals, and you better refer to the number there, then.

The Clerk: With reference to the operator's license is Defendant's No. 8.

Mr. McKevitt: No. 8. Well, thank you.

The Court: No. 8.

Mr. McKevitt: The defendant excepts to the failure of the Court to include in the instruction on last clear chance that was given the language in Defendant's Requested [629] Instruction No. 10, that the doctrine of last clear chance does not mean a splitting of seconds when emergencies arise.

That was all, your Honor.

The Court: I might say on this instruction which I gave off the cuff here, having overlooked it, on the failure to maintain the roadway, I had assumed that I gave the statement in the same language as your allegation here, and I read that to mean that you are claiming that the defendant railroad company was negligent in failing to maintain a proper safe level of rock and cinder ballast on the road-

way leading up to and immediately adjacent to the wooden planking. Your language is "on the roadway leading up to said crossing and immediately next to the wooden planking," which means it is on the roadway and that part of it immediately next to the wooden planking.

Mr. Etter: That is all we mean by it. I don't think that they have to maintain that highway out there.

The Court: I don't think the jury could be misled. That is the only evidence there was was that hole.

Mr. Etter: That is correct.

The Court: All right, bring in the jury. The record will show your exceptions.

(Whereupon, the following proceedings were had in the presence of the jury:) [630]

The Court: All right, you may be seated, gentlemen. I will have the bailiffs sworn now.

(Whereupon, the bailiff were sworn to take the jury in charge.)

The Court: The jury will retire now to consider its verdict.

(Whereupon, the jury retired at 4:55 p.m. to consider its verdict.)

The Court: I suggest that counsel leave their telephone numbers here so you can be called to get down within a reasonable time when the jury is ready with the verdict.

Court will recess subject to call.

(Whereupon, the trial in the instant case was recessed subject to call.) [631]

RULING ON MOTION

Be it remembered that the above-entitled cause came on for hearing before the Honorable Sam M. Driver, Judge of the said Court, at Spokane, Washington, on March 3, 1955, on defendant's motion to set aside verdict and judgment entered thereon or, in the alternative, for a new trial; counsel being present as during the trial of said cause.

(After hearing argument by counsel for the respective parties, the Court made the following oral ruling on the motion:)

The Court: Well, the hour is getting late here, it is time for all of us to go to lunch. These railroad [632] crossing cases have always been difficult for me and I suppose they always will be. There are laws that give, without question, rules of law that give the railroad company the right of way and make the presence of the track and the train in themselves warnings of danger, and it is the duty of people to stop, look and listen. And then, on the other hand, we have what, as practical people, we know is the tendency of juries to find for the plaintiff in these cases where there is a corporate railroad defendant. So that we get these borderline cases that result in verdicts for the plaintiff.

But I think here that there is sufficient evidence to warrant or to sustain the verdict in this case, and I will deny the motions on that basis.

I think that, also, it seems to me, that as a matter of common sense that there must be situations, and I think there was here, where the jury could find either one or the other phase of the doctrine of last

clear chance can apply, depending upon how they view the credibility of the witnesses and depending upon what inferences they may draw, reasonable inferences, from the testimony, and if it is possible for them to draw either one or the other, depending upon what inferences they draw or what weight and credibility they give to conflicting testimony, then, it seems to me, that a judge has no alternative than to submit [633] both doctrines and let the jury make the choice.

The motions will be denied, then.

Court will recess until 1:30.

[Endorsed]: Filed April 14, 1955.

[Endorsed]: No. 14795. United States Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a corporation, Appellant, vs. Ernest Everett, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed: June 24, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14795

NORTHERN PACIFIC RAILWAY COMPANY,	
a corporation,	Appellant,
vs.	
ERNEST EVERETT,	Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT RELIES

In compliance with Rule 17, Subparagraph 6, of the above Court, appellant states that the following are the points on which it intends to rely on this appeal:

In support of this contention that the District Court should have granted its motion for a directed verdict made at the close of appellee's evidence and renewed at the close of all the evidence, appellant asserts:

1. The evidence conclusively showed as a matter of law that the death of appellee's decedent was caused and brought about solely and alone through her own negligence, which was the direct and proximate cause of her death.

2. The complaint charged the defendant railway company with eleven separate acts of negligence; at the close of all the evidence the Court withdrew eight of said charges from the jury's consideration and submitted to it for determination the following charges of negligence:

(a) Failure to give statutory crossing signals by whistle or bell;

(b) Defective condition of crossing;

(c) Last Clear Chance Doctrine.

3. There was no evidence to support subdivision (a) since the evidence disclosed that the decedent did have ample warning by whistle and bell signal of the train's approach; that the accident happened in broad daylight, with no impairment of view as the result of weather conditions; that the decedent was thoroughly familiar with the crossing in question and knew she was about to proceed over the main line of the railway company; that at a distance of at least 100 feet from the crossing and at all points up to the same she had an unobstructed view of the train's approach; that she negligently stalled the truck on the crossing in an attempt to beat the train across the crossing.

Negligence cannot be predicated on the alleged failure of the defendant's employes to give the statutory crossing signals at the crossing in question since such failure, if any, was not the proximate cause of the death of plaintiff's decedent. Had she looked and listened before reaching the crossing, as by law required, she would have had ample notice of the train's approach in sufficient time to have brought the truck to a stop short of the crossing. (Subdivision b—Defective Condition of Crossing) There is no evidence to support the submission of this issue to the jury since no testimony was introduced which would indicate, either directly or by reasonable inference, that the alleged defective con-

dition of the crossing was a proximate cause of the collision. The fireman and the engineer in charge of defendant's train were the only actual eye witnesses of the approach of the truck to the crossing. No inference can be derived from their testimony that the alleged defective condition had anything to do with the truck stalling on the crossing. The condition of the crossing was an incident to and not in any manner a proximate cause of the death of plaintiff's decedent. (Subdivision c—Last Clear Chance Doctrine) As previously observed, the only evidence as to the approach of this truck to the crossing came from the engineer and fireman. The collision occurred on the main line of the defendant. The train involved was a passenger train consisting of seven or eight coaches and a Diesel locomotive. It was traveling at a lawful rate of speed of not to exceed 65 miles per hour. The evidence conclusively established that when it first became apparent to the engineer and fireman that this truck was not going to yield the right of way to the defendant that the train was dinamited. Because of the distance involved and the speed of the train, expert testimony of the defendant in no wise controverted, but conclusively established that the train could not have been stopped short of the crossing nor its speed diminished so as to have enabled the decedent minor to have gotten into a place of safety; as a matter of fact, the evidence conclusively established that after the truck had stalled on the crossing the minor got out of the truck, took three or four steps, traveling a distance of 10 or 12 feet, before the train struck

the truck which in turn was hurled against the decedent. The position of appellant is that where equal opportunity is given to the driver of the truck and the train operatives to have avoided the collision the doctrine of last clear chance has no application.

4. The District Court should have ruled as a matter of law that plaintiff's decedent was guilty of negligence which was the direct and proximate cause of her death and accordingly should have granted appellant's motion for a directed verdict or motion for judgment notwithstanding the verdict.

5. That in any event the District Court committed errors of law, because of which the cause should be remanded for a new trial, in the following respects:

(a) The evidence showed that at the time of her death the minor child was 16 years of age. The Court erred in sustaining an objection to a question propounded to plaintiff on cross examination to the effect that at the time of her death the minor child was not licensed under the laws of the State of Washington to operate a motor vehicle.

(b) The Court erred in sustaining the objection of plaintiff's counsel to an offer of proof of this fact.

(c) The Court erred in refusing to give Defendant's Requested Instruction No. 8, or an instruction substantially similar thereto. The requested instruction reads as follows:

"Defendant's Requested Instruction No. 8.

"I instruct you that under the laws of the State of Washington in force at the time of this accident

it was unlawful for a person to cause or knowingly permit his child under the age of eighteen years to operate a motor vehicle upon a public highway as a vehicle operator unless such child has first obtained a vehicle operator's license. Said law further provides that no person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be operated by any person who is not legally licensed as an operator. If you find from the evidence in this case that Erna Mae Everett at the time in question did not have a vehicle operator's license and that the plaintiff herein knew that she did not have such license, and if you find that said plaintiff authorized or knowingly permitted his daughter to operate the vehicle in question, then I instruct you that the plaintiff violated the law above referred to and was guilty of negligence. If you further find that such negligence was the direct and proximate cause of his daughter's death then your verdict should be for the defendant."

(d) The Court erred in refusing to give defendant's Requested Instruction No. 10, or an instruction substantially similar thereto. The requested instruction reads as follows:

"Defendant's Requested Instruction No. 10.

"Plaintiff has invoked in this case what is known in the Law as the last clear chance doctrine. I instruct you that you are not here concerned with a last possible chance on the part of the Railway Company to have avoided this collision. A clear chance to avoid a collision involves the element of sufficient time on the part of the engineer operating

defendant's train to have appreciated the peril of the driver of the truck and to take the necessary steps to have avoided injuring the driver thereof. In other words, last clear chance implies thought, appreciation and mental direction on the part of the engineer and the lapse of sufficient time to effectively act upon the impulse to have avoided the collision. The doctrine of last clear chance does not mean a splitting of seconds when injuries arise. The words mean exactly as they indicate, last clear chance, not possible chance.

"I therefore instruct that if you find from the evidence of this case that after the engineer was first able to discover the peril of the driver of the truck he was unable to bring his train to a complete stop or to have slackened its speed for a sufficient interval of time in order to permit the driver to escape, then your verdict should be for the defendant."

(e) The Court erred in giving the following instruction to the jury:

"Now, there is involved in this case what is known as the doctrine of last clear chance. It is permissible to use the doctrine only after you find, and you may not use it unless and until you first find, that in the events leading up to the accident in question, both the deceased and the defendant were negligent.

"The doctrine of last chance is divided into two phases to cover two separate possibilities: (1) that where the defendant actually saw the peril of the traveler on the highway and should have appreciated the danger and failed to exercise reasonable

care to avoid injury, such failure made the defendant liable, although the traveler's negligence may have continued up to the instant of the injury; and (2) that where the defendant did not actually see the peril of the traveler, but by keeping a reasonably careful lookout, commensurate with the dangerous character of the agency and the locality, should have seen the peril and appreciated it in time, by the exercise of reasonable care, to have avoided the injury, and failure to escape the injury results from failure to keep that lookout and exercise that care, the defendant was liable only when the traveler's negligence had terminated or eliminated or culminated in a situation of peril from which the traveler could not, by the exercise of reasonable care, extricate himself.

"Therefore, if either of the two conditions just mentioned are found by you to have existed with respect to the collision in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injuries suffered by the plaintiff, that is, on account of the death of Erna May Everett in this case, and proximately resulting from the accident, despite the negligence of the deceased.

"I further instruct you, however, that the doctrine of last clear chance contemplates a last clear chance, and not a last possible chance. It implies thought, appreciation, mental direction, and the lapse of sufficient time to act effectively upon the impulse to save another from injury. There must

be an appreciable interval of time intervening between a collision and the moment when the engineer of a train has knowledge or notice of the danger in which the other party has been placed."

(f) The Court erred in instructing the jury with reference to the alleged defective condition of the crossing and the immediate approach thereto. In stating the issues involved the Court recited that one of them was

"That the defendant negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking at the crossing."

(g) That the verdict was excessive and should either be reduced by this Court or a new trial directed.

Dated this 7th day of July, 1955.

McKEVITT, SNYDER & THOMAS,

/s/ By F. J. McKEVITT,

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed July 9, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD

Pursuant to Rule 17, Subparagraph 6, of the Rules of the above Court, appellant designates the following portions of the record as material to the consideration of this appeal to be incorporated in the printed transcript:

1. Complaint.
2. Answer to Complaint.
3. Reply.
4. Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16 and 33.

5. Defendant's Exhibits 1, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35 and 36.

(Note: The exhibits above referred to were received in evidence and are deemed material to this appeal, but are not suitable for printing, and appellant assumes that all original exhibits will be considered by the Court.)

6. Reporter's entire record of the proceedings and testimony at the trial.

7. Defendant's Requested Instructions Nos. 8 and 10.

8. Verdict.

9. Judgment on the verdict.

10. Motion to Set Aside Verdict and Judgment entered thereon and for Judgment in accordance with defendant's prior motions for a directed verdict; and alternative Motion for a New Trial.

11. Order denying defendant's motion to set aside

verdict and judgment entered thereon and for judgment in accordance with defendant's prior motions for a directed verdict; and alternative motion for a new trial.

12. Notice of Appeal.

13. Bond on Appeal.

14. Designation of Contents of Record on Appeal directed to the District Court Clerk pursuant to Rule 75 of the Federal Rules of Civil Procedure; Supplemental Designation of Contents of Record on Appeal.

15. Order of District Judge extending time for docketing record with United States Court of Appeals for the Ninth Circuit.

16. Statement of Points on which Appellant Relies, filed with the Court of Appeals for the Ninth Circuit pursuant to its Rule 17, Subparagraph 6.

17. This designation.

Dated this 6th day of July, 1955.

McKEVITT, SNYDER & THOMAS,

/s/ By F. J. McKEVITT,

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed July 9, 1955. Paul P. O'Brien,
Clerk.

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No. 14795

**IN THE
United States Circuit Court of Appeals
For the Ninth Circuit**

**NORTHERN PACIFIC RAILWAY
COMPANY, a corporation,**

Appellant,

vs.

ERNEST EVERETT,

Appellee.

APPELLANT'S BRIEF

*Appeal from the District Court of the United States
for the Eastern District of Washington,
Northern Division*

HON. SAM M. DRIVER, Judge

**McKEVITT, SNYDER & THOMAS
711 Old National Bank Building
Spokane, Washington**

Attorneys for Appellant

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No. 14795

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

NORTHERN PACIFIC RAILWAY
COMPANY, a corporation,

Appellant,

vs.

ERNEST EVERETT,

Appellee.

APPELLANT'S BRIEF

STATEMENT AS TO JURISDICTION

This is an appeal from a final judgment in the sum of \$8632.76 entered on the verdict of the jury in plaintiff's favor. Appellee sued appellant, a Wisconsin corporation doing business as a common carrier within the State of Washington, and F. W. Scobee, an engineer, in the District Court of the United States for the Eastern District of Washington, Northern Division, to recover damages in the sum of \$31,332.76

for the death of his seventeen year old daughter as the result of a crossing collision between a panel truck which she had been driving and one of defendant's trains. The complaint as lodged did not confer jurisdiction upon the District Court since such jurisdiction could only arise out of diversity of citizenship.

While it was alleged that the appellant railroad was a foreign corporation, there was no allegation as to the residence or citizenship of either the plaintiff or the defendant engineer. (Tr. 2-4)

Appellant had not previously raised the question of lack of jurisdiction, reserving its right to so do to a subsequent period in the course of the litigation. During the course of the trial plaintiff asked leave to amend the complaint by dismissing F. W. Scobee, the engineer, as a defendant in the action, and alleging that plaintiff was a resident and citizen of the State of Washington. (Tr. 39-40) Under the complaint as amended the District Court would appear to have acquired jurisdiction under Section 41 (Judicial Code, Sec. 24, amended; U.S.C.A., Title 28, Sec. 41).

The jury awarded a verdict in the sum of \$8632.76 in favor of plaintiff appellee and against appellant, upon which verdict judgment was entered January

21, 1955; (Tr. 15-16) thereafter on January 28, 1955, appellant interposed a motion to set aside the verdict and the judgment entered thereon or in the alternative for a new trial; (Tr. 16-25) this alternative motion was denied by order of the District Judge on March 17, 1955. (Tr. 26-27)

On April 12, 1955, appellant filed a notice of appeal with the District Court, the notice being in the manner and within the time provided by Rule 73 of the Federal Rules of Civil Procedure, and on the same day appellant filed the required appeal bond. (Tr. 26-30) On May 5, 1955, the District Court by order extended the time for filing the record with this Court up to and including the 27th day of June, 1955; (Tr. 30) on May 3, 1955, appellant filed in the District Court its designation of contents of record on appeal and on May 16, 1955, filed its supplemental designation of record with the District Court. (Tr. 31-32) The record was docketed with this Court on July 9, 1955. Upon the foregoing facts this Court has jurisdiction of this appeal by virtue of Title 28, U.S.C.A., Secs. 1291 and 2107 and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

By a crossing collision between a panel truck which had stalled on a country crossing on the main line of the appellant railroad near Ellensburg, Washington, and one of the railway company's passenger trains, plaintiff's daughter was instantly killed. Plaintiff brought this suit in the District Court of the United States, for the Eastern District of Washington, Northern Division, to recover \$31,332.76 damages for her death.

The complaint in paragraph VI recited seven separate charges of negligence. (Tr. 5-6) In paragraph VII, under an allegation of wanton misconduct, there were four separate allegations of negligence. (Tr. 6, 7, 8)

On motion of defendant, all charges of negligence were withdrawn from jury consideration except:

- (a) Failure to give the statutory crossing signals;
- (b) Failure to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking;
- (c) Last clear chance. (Tr. 517-518)

The attention of this Honorable Court is particularly directed to paragraph V of the complaint, which reads as follows:

“That on or about the 8th day of March, 1952, at about the hour of 2:50 p.m. on said day, Erna Mae Everett was operating a 1938 Dodge panel truck owned by the plaintiff herein, in a general northerly direction along said O'Neill Road; that as Erna Mae Everett attempted to use said public crossing to cross over said right of way and track, said panel truck she was driving stalled squarely on the defendant company's railroad tracks; that at the same time and place defendants were operating a passenger train in a general westerly direction over and along said railroad track and at said time and place defendants ran said passenger train into and against the panel truck Erna Mae Everett was operating as aforesaid, whereby the said Erna Mae Everett was violently crushed and injured and shortly thereafter the said Erna Mae Everett died from the injuries so received.” (Tr. 4-5)

The accident occurred approximately at the time alleged and there is no dispute that it was a clear day without any impairment of vision as the result of weather conditions. As stated by one of plaintiff's witnesses, John J. O'Neill:

“It was a nice, clear day.” (Tr. 285)

As alleged in the complaint, the main line of the Northern Pacific Railway Company at the point of

accident extended in a general easterly and westerly direction. The roadway on which plaintiff's intestate was traveling extended in a general northerly and southerly direction. (Tr. 4, Defts. Ex. 1) The panel truck was being driven by plaintiff's daughter in a general northerly direction and defendant's passenger train was being operated in a general westerly direction. (Tr. 4-5) (Allegations of complaint) However, as shown by the map, Defendant's Exhibit 1, the tracks of the railway company extend somewhat in a northwesterly direction and the roadway along which the panel truck was being driven in a general northerly direction until at a distance of about 10 or 15 feet from the crossing its approach to the tracks is practically at right angles.

The truck in question was a 1940 model and was 10 years old when purchased second hand by plaintiff. (Tr. 132-133) Defendant's passenger train consisted of a Diesel locomotive and seven or eight passenger cars. (Tr. 205) Defendant's main line track east of the crossing was straight for a distance of 4 miles. The grade of the track as it approached the crossing, for a distance of 1400 feet east thereof, ranged from a zero grade to a .5 grade, the average

for said distance being about 3 inches per 100 feet. (Tr. 53) The grade of the country road over which the truck was being driven varied. In this connection we quote the testimony of defendant's Division Engineer, Walter R. Adams, called by plaintiff for the purpose of explaining defendant's Exhibit 1:

“Q. All right, now, if I have it correctly, to recap, we have 200 feet that is almost level?

A. Yes.

Q. With the exception of a few inches. The next 70 feet is an approximate two foot raise?

A. Yes.

Q. The next 70. Then beyond that, the next 30, is that correct?

A. The next, there is another two foot raise.

Q. There is another two foot raise?

A. Now, that 70 feet, excuse me, that 70 feet is, yes, that's right.

Q. There is a two foot raise?

A. Yes.

Q. All right, and then in the next — was it 20 feet, did you say?

A. 12 feet.

Q. The next 12 feet?

A. Is 6 inches up.

Q. Six inches up. And the last 18 foot? (48)

A. Well, the last 12 feet out, it would be the six inch raise.

Q. Then, the footage began, as you have indicated, 70 feet and the next 100 feet?

A. Yes." (Tr. 61, 62)

686 feet east of the middle of the crossing is located what is referred to in the record as an overpass. (Tr. 49) At this point the main line of the Milwaukee railroad crosses the main line of the Northern Pacific; (Tr. 46) 1323 feet east of the center of the crossing is a white post. (Ex. 1, Tr. 49)

With regard to the speed of the train plaintiff's witness, John J. O'Neill, testified that when he first saw it coming out from under the viaduct, or underpass, it was traveling between 55 and 60 miles an hour. (Tr. 292-294)

Plaintiff's witness, Lawrence Shaw O'Neill, stated that when he first saw it it was just coming under the underpass. (Tr. 303) At this point he fixes its speed at 50 to 55 miles per hour. (Tr. 309)

Engineer Scobee testified that during the last mile

to the crossing he had probably got up to 60 miles per hour or a little better. (Tr. 219)

Fireman Williams stated that the speed of the train at the whistle post was 60 miles per hour (Tr. 419) and that the maximum speed permitted at that point was 70 miles per hour. (Tr. 420)

Concerning the giving of whistle signals plaintiff, Ernest Everett, testified that his home was situated southeast of the crossing, (Tr. 66) and about a quarter of a mile back from the county road along which his daughter was traveling. (Tr. 67) After leaving the home and reaching the county road the deceased girl would travel a half mile in order to reach the crossing. (Tr. 135) When he first saw the train he states that it was opposite a billboard on the highway; (Tr. 93) this billboard according to plaintiff's testimony was a mile and $3/10$ ths east of the crossing. (Tr. 99) His daughter went out of his line of vision $3/10$ ths of a mile from the crossing; (Tr. 100) this was at about the time that he also saw the train. He testified he heard

“two or three toots of the whistle, sharp toots.”
(Tr. 94)

Plaintiff's witness, John J. O'Neill, testified that the first whistle signals he heard were three sharp

toots. (Tr. 288) He fixed on Defendant's Exhibit 1 a point where he estimated the train to be and this is labelled "J. J. O'Neill" and marked as "Train." (Tr. 287)

Plaintiff's witness, Lawrence Shaw O'Neill, testified that when he first heard the whistle the train was just coming under the underpass. (Tr. 303-304) He stated that prior to this time he had not noticed any train whistle. (Tr. 304) As to the type of whistle given he testified as follows:

"Q. What kind of a whistle was it that you heard when you first heard it?

A. Two long blasts.

Q. Two long blasts. And by a long blast, in seconds, could you estimate it?

A. Well —

Q. Pretty hard to do, but if you can. If you can't, that is all right too.

A. Well, I have heard the estimates here in the court and I think that would be just about right.

MR. McKEVITT: A little louder, please?

A. The two seconds for each blast and about the same in between.

Q. (By Mr. Connelly): That is your estimate of it, about two seconds a blast?

A. Yes.

Q. And you say you heard two of these?

A. Yes.

Q. And was it after that that you glanced down toward the crossing?

A. No, it was when he got about half way between the trestle and the crossing, well, he whistled three real sharp fast ones, and then was when I glanced at the crossing." (Tr. 305)

Engineer Scobee was called as an adverse witness. Since he had been dismissed as a party defendant it is appellant's contention that he was not adverse—in any event with reference to the whistle signals that were given. As a matter of fact, the trial Court ruled that he was not an adverse party within the purview of Rule 43, Subdivision b of Rules of Civil Procedure. (Tr. 243) He testified as follows:

“Q. All right. Will you tell us what happened after that?

A. Well, after glancing at the speedometer and approaching this whistle post, the whistle post is a sign that you are approaching a crossing and prepare to start blowing your whistle for this crossing.

Q. All right.

A. And I had reached for the whistle and started my procedure of blowing the whistle for this crossing.

Q. All right?

A. I had blowed one long whistle, and then there is a pause, and blowed another long whistle, and then this truck —

Q. Where were you? Where were you when you blew one long whistle?

A. One long, and then a pause, and then another long one.

MR. McKEVITT: And another long?

A. Another long.

Q. (By Mr. Etter): A long whistle, what do you mean by a "long" whistle, would you tell us?

A. Well, at grade crossing, on your road crossings over railroad track, we have two long and a short and long whistle we blow for those crossings for a warning.

Q. The first one you blew was the long one?

A. The long whistle. (Tr. 250-251)

* * * *

Q. All right, what would a long whistle be, then, in seconds?

A. Well, your long whistle would run probably two seconds or a little better.

Q. Two seconds or a little better?

A. Yes.

Q. So you gave a long whistle, is that right?

A. Yes.

Q. And then a pause?

A. Then a pause.

Q. How long a pause?

A. I couldn't tell you.

Q. Well, would it be one second or two seconds?

A. Well, there was a pause in there, but I couldn't tell how long it was.

Q. It would be one second, at least, wouldn't it?

A. It would be more than one second, yes.

Q. Well, make it brief, would it be two seconds?

A. Around that neighborhood, I couldn't pin point it.

Q. Then you gave another long whistle?

A. Another long.

Q. Beg your pardon?

A. Another long whistle, yes.

Q. All right; and then what happened?

A. Then this truck showed up.

Q. When, right after the second long whistle?

A. Yes, after I had ceased blowing the second whistle. (Tr. 252-253) * * * *

Q. All right, and this whistle tooting you started, as I gather it, you started it as you came to the whistle post; isn't that right?

A. Yes, at the whistle post or shortly after the whistle post.

Q. Shortly —

A. I had arrived at the whistle post.

Q. You had arrived at the whistle post, and that is when you started whistling?

A. Yes." (Tr. 253)

It is the serious contention of appellant that appellee is bound by this testimony.

Fireman Williams, called as a witness on behalf of the defendant, testified as follows:

"Q. Now, do you remember whether or not any whistle signals were given by that train on that date? (Tr. 416)

A. Yes, there were.

Q. Are you familiar with this whistling post that we have been talking about here?

A. Yes, sir.

Q. With reference to that whistling post, where did the signals that you know were given start?

A. Well, they started at or very near the whistling post, I would say.

Q. What whistle signals were given by the engineer that you heard?

A. Well, he blew two long blasts.

Q. And then what did he do?

A. Well, he set the automatic air, service application.

Q. Did you give any whistle signals that date?

A. I did.

Q. And you were sitting up there in front with him?

A. Yes.

Q. What did you have to do in order to give these whistle signals?

A. Well, I jumped up out of the seat when I saw the truck start for the crossing after it had slowed down.

Q. What did you go for the whistle for?

A. Well, it looked to me like there was going to be an emergency there.

Q. Well, the engineer had been blowing the whistle, and why did you go for the whistle?

A. Well, you can't blow the whistle with your left hand and shut the throttle off at the same time.

Q. I see. In other words, you took over where he left off, is that what you are telling us? (Tr. 417)

A. That's right.

* * * *

Q. Do you know how many blasts of the whistle you gave?

A. No, I haven't any idea.

Q. Well, what type of whistle signal was it?

A. Just short blasts, continuous.

Q. What you call emergency blast whistles?

A. That is what I would call it.

Q. And do you know whether you gave more than one?

A. Yes, I know that.

Q. Do you think you gave more than two?

A. I would say so.

Q. Three?

A. Yes, I think more than three." (Tr. 418)

The only actual eye witnesses of the immediate approach of this truck to the crossing were the engineer and the fireman. Appellant emphasizes this statement because it is its firm conviction that the judgment in this case should be set aside and the action dismissed outright; this for the reason that the judgment can only be justified on the basis of the doctrine of Last Clear Chance.

Appellee called as witnesses the following persons:

- (1) Walter R. Adams (Tr. 42);
- (2) Ernest Everett (Tr. 63-91);
- (3) Rena Everett (Tr. 328-347);
- (4) Lee Klocke (Tr. 170-200);
- (5) John J. O'Neill (Tr. 280-296);
- (6) Lawrence Shaw O'Neill (Tr. 300-321);
- (7) Francis William Scobee (Engineer) (Tr. 202).

The witness Walter R. Adams, appellant's division engineer, simply identified and explained Defendant's Exhibit 1, a map prepared by him or under his supervision, which was voluntarily furnished by appellant. (Tr. 40-41) The accuracy of this exhibit is not questioned. (Tr. 44)

Plaintiff appellee, Ernest Everett, the father of the deceased girl, testified that the truck that she was driving passed out of his view when it was still 3/10ths of a mile from the crossing. (Tr. 140-141)

Plaintiff appellee's witness, Rena Everett, the mother of the deceased girl, testified that the last time she saw her daughter was when the panel truck went through the outer gate on to the county road. (Tr. 322) It has already been pointed out that this was one-half mile distant from the crossing.

Plaintiff appellee's witness, Lee Klocke, lived about 80 rods north of the Everett home. (Tr. 170) His premises were likewise on the county road along which the girl traveled. He further testified that from the crossing to his gate was 80 rods. He was not an eye witness of the immediate approach of this truck to the crossing.

Plaintiff appellee's witness, John J. O'Neill, did not observe the truck as it approached the crossing. He was working in a field north of the crossing at a point designated as "X" on the map, with his initials next thereto. (Tr. 284) He testified as follows on direct examination:

"Q. Now, did something out of the ordinary occur as you and the other fellows were standing there working?

A. Well, this accident happened there.

Q. Will you tell us what it was that first gave you notice that something out of the ordinary was happening?

A. Well, I don't know what really caused it, we just heard the train and looked up and there was a car on the crossing and the train coming. (Tr. 285)

* * * *

Q. Where was the train when you first heard the rumble and looked up and saw it?

A. Just coming under the underpass.

Q. Just coming under this Milwaukee underpass that is indicated on the map?

A. That's right.

Q. The concrete abutment business?

A. That's right. (Tr. 286)

* * * *

Q. When you first saw the train, as I understand it, that was as it was just emerging from the Milwaukee underpass?

A. That's right.

Q. Did your vision taken in the approaching automobile driven by the Everett girl at the same time?

A. Well, when we — the way we was standing there, we just looked and seen the train and the car both.

Q. Now, was the car on the crossing at that time?

A. That's right, yes.

Q. Did you see the girl at the time you saw the car?

A. She was in it.

Q. She was inside the car at that time?

A. Yes.

Q. Could you tell what she was doing in the car at that time?

A. Well, no, you couldn't tell what she was doing. You might imagine she was stalled or something, that it was stopped there.

Q. *The car was completely stopped and stalled when you first saw it?*

A. *That's right.*

Q. What happened then after you took this in with your eyes and saw this?

A. Well, she got out, shut the door, and just hesitated there, and then she took off.

Q. About how far was the train from her when she got out of the car and shut the door and —— (Tr. 288)

A. Well, that was happening so quick, I couldn't say. It was ——

Q. When she had took off, in what manner did she take off.

A. Well, it would — the car on the track and then she headed off — it would be a north, northern direction, northeast.

Q. North away from —

A. Yes.

Q. Away from the track toward the highway?

A. That's right.

Q. Was she running at that time?

A. Well, she was getting out of the way, she had time to take about three, four steps. That is the last I could see of what happened there. I figured she was about 10 feet from the car.

Q. You figure she was about 10 feet from the car when the train struck, is that it?

A. Huh?

Q. She was 10 feet from the car when the car was hit by the train?

A. Well, approximately that. She was running and you could see the space between her and the car.

Q. Did you think she had escaped when you saw all this?

A. I thought she would make it." (Tr. 289)

John J. O'Neill specifically testified that he did not know how long this truck was on the crossing before it was hit. (Tr. 297)

Lawrence Shaw O'Neill testified that his attention to the approach of the train was attracted by certain whistle signals. He further stated that when he glanced up in the direction of the train that he did not notice an automobile on the crossing; (Tr. 304) that when he first looked at the crossing the truck was stalled there; as he put it:

“* * * it was sitting there on the tracks.” (Tr. 305)

He further testified that when he first looked at the crossing he did not see anyone in the automobile and then in a split second the girl jumped out of the car, hesitated for a moment, and started running and that she had taken three or four steps when the impact occurred. (Tr. 306)

In view of this state of the record, appellant asserts that the testimony of the engineer and the fireman as to the manner in which this truck was driven on to the crossing stands uncontradicted.

On examination by plaintiff appellee's counsel, the engineer testified that he first observed this truck

after he had ceased blowing the second long whistle. (Tr. 252-253) At this point the truck was 25 feet from the crossing; (Tr. 253) when he had finished the second long blast he was still east of the Milwaukee overpass but was unable to fix the exact distance. (Tr. 254) Prior to this time the truck had not come into his view. (Tr. 255) He was then interrogated as follows:

“Q. All right. Now, will you tell us then what happened?

A. Well, I made an application of the brakes. The truck came out in this kind of a blind area here (indicating). This Milwaukee viaduct, I made — I couldn't tell you how much of an air application I made, but I made an application of the brakes and I felt the train take hold, and then the truck momentarily stopped at the crossing.

Q. Stopped at the crossing?

A. Just momentarily stopped clear of the crossing.

MR. McKEVITT: Clear of the crossing?

A. Clear.

Q. (By Mr. Etter): You mean clear —

A. Of the road crossing over the track.

Q. Clear of the crossing on the south side of the crossing?

A. That's right.

Q. How close was it to the crossing?

A. It was clear —

Q. Beg your pardon?

A. Oh, it must have been 10 feet, anyhow, before it was clear of the track.

Q. It was clear. All right, and then what happened?

A. I released the air.

Q. Beg your pardon?

A. I released the air that I had set on the train.

Q. You released the air. All right, then, and will you tell us what happened?

A. Then all at once the truck started bucking up onto the track. (Tr. 256)

Q. All right, where were you when it started bucking? Where was your train?

A. I was coming under the viaduct at that time approaching the crossing. Oh, I would say —

Q. Coming into the viaduct, under the viaduct?

A. I would say about, oh, 600 feet from the crossing at this time.

Q. About 600 feet. When it started bucking, then what happened?

A. That is about — now, I don't know just exactly the measurements on that, but I was coming under the viaduct when this happened.

Q. When it started to buck?

A. Yes.

Q. That is, about 10 feet south of the crossing?

A. It was just clear of the crossing before it started bucking at —

MR. McKEVITT: Keep your voice up. I didn't hear that last part of the question and answer at all.

A. I had just released the air and then the truck started bucking up on the track just as I was coming under the viaduct.

Q. (By Mr. Etter): Just as you were coming under the viaduct?

A. Yes. (Tr. 257)

* * * *

Q. Calling your attention to the Defendant's Exhibit No. 26, talking about that point, would it have been west, just west on the west pier, or would it be right there (indicating), do you think, when you saw the car buck right up onto the crossing?

A. I couldn't tell positively, because my attention was diverted mostly to the truck. I couldn't tell you, pin point down the footage there, just how close I was to the truck.

Q. No, but all I am trying to ask you, do you think you were out the other side of it or on this side of the viaduct? You knew you were at the viaduct.

A. I was at the viaduct, but I tell you just how far, I couldn't tell you.

Q. All right.

A. Because my attraction was on this car.

Q. Would it be fair, then, to both of us to say you were right about the middle of the viaduct?

A. Well, close to it.

Q. All right. And that is when the car bucked out to the track?

A. It bucked its way onto the track, yes.

Q. All right. So then you were right under the viaduct, what did you do when the car bucked right out on the track?

A. Well, I had already released the air when I saw the truck approach.

Q. Beg your pardon?

A. When I saw the car approach the crossing, it come out from behind this pier up to the

crossing, and I had a feeling that they might try to go across so I set some air, how much I don't know. But I had set an amount of air and it was just one of those things of slowing down in case, and when it bucked, when it come up to the crossing, it momentarily stopped. Well, that was a relief to me, I released the air.

Q. All right.

A. Well, the next thing that come up, the truck started bucking its way up there on the track.

Q. All right, the air was released at the time the car bucked up on the track and you were under the viaduct?

A. That's right.

Q. In other words, you had no air on when you were under the viaduct, but the car then bucked up to the track and you had just released the air?

A. I had released the air.

Q. All right, what did you do when you saw it go right up on to the track?

A. That is when I had to go into emergency.

MR. McKEVITT: You what?

A. I had to take and put the train into emergency when the truck went on the track.

Q. (By Mr. Etter): You put it in emergency?

A. Yes.

Q. All right. What did you do? Tell us now just exactly what you did.

A. What I did was have to sit there, because that is all I could do was put the train in emergency. That dumped all my reservoirs into the train line." (St. 261-263)

Fireman Williams testified that when he first saw the truck the Diesel engine was just east of the Milwaukee overpass. (Tr. 415) He estimates a distance in this regard of 100 feet. (Tr. 416) At this point he states that the truck was 15 or 20 feet from the crossing and that it was moving. He fixes its speed at about 10 miles per hour. He testified:

"Well, it slowed down very slow or may have come to a stop, I don't know." (Tr. 416)

His testimony is further to the effect that at this time the truck was stalled off the crossing. He was asked:

"Q. Then what did you observe?

A. Well, it started ahead.

Q. Describe its motion. Was it smooth —

A. Well, it jumped, you might call it jerked, ahead, it wasn't smooth." (Tr. 416)

The deceased was thoroughly familiar with this

crossing. In November, 1950, her parents took up the residence she was occupying at the time of her death, March 8, 1952. (Tr. 64) She was attending school at Ellensburg, four miles distant; (Tr. 130) in order to do so she would have to cross at this point the main line of the Northern Pacific at least twice a day during the school period. (Tr. 131) The plaintiff, her father, testified he knew this was the main line of the Northern Pacific; that it operated passenger trains and freight trains over that crossing day and night; and that his daughter also knew of these facts. (Tr. 131) The crossing was protected by a standard cross-buck sign. (Defts. Ex. 1)

On cross-examination plaintiff appellee was shown Defendant's Exhibits 17 and 18 taken March 10th, two days after the accident. (Tr. 111) In Exhibit 17 the camera was east of the crossing and is a close-up view of the crossing looking toward the west. (Tr. 111) He stated that that was a fair representation of that crossing on March 8, 1952. (Tr. 112) He was shown Defendant's Exhibit 18, likewise taken two days after the accident. In that exhibit the camera is west of the crossing, and facing toward the east, the camera being in the center of the track. He testified that that was a fair representation of the conditions on March 8th. (Tr. 115)

He was shown Defendant's Exhibit No. 20, also taken two days after the accident; there the camera is 300 feet east of the crossing facing towards the west. He testified that that was a fair representation of the conditions that existed on March 8th.

He was shown Defendant's Exhibit 21, taken two days after the accident; in that exhibit the camera is 350 feet east of the crossing facing west; he admitted that that was a fair representation of the conditions existing on the day of the accident. (Tr. 122)

He was shown Defendant's Exhibit 23, with the camera 450 feet east of the crossing facing west; he was shown Defendant's Exhibit 24, with the camera 500 feet east of the crossing facing west, taken two days after the accident; he was shown Defendant's Exhibit 25, with the camera 600 feet east of the crossing facing west; he was shown Defendant's Exhibit 26, with the camera 700 feet east of the crossing facing west; he was shown Defendant's Exhibit 27, with the camera 900 feet east of the crossing facing west; he testified that all of these exhibits were fair representations of the conditions existing in that vicinity on the date of the accident. (Tr. 123-125)

He was shown Defendant's Exhibit 28, with the

camera 1000 feet east of the crossing facing west; Exhibit 29 with the camera 1400 feet east of the crossing facing west; he admitted that these exhibits were fair representations of the conditions existing on the date of the accident. (Tr. 126)

He was shown Defendant's Exhibit 30, a panoramic view consisting of 4 pictures; in this exhibit the camera was 25 feet south of the crossing facing north and east; he admitted that that exhibit was a fair representation of the conditions that existed on that date.

He was shown Defendant's Exhibit 31, a panoramic view consisting of three pictures, with the camera 150 feet south of the crossing looking east and north, taken two days after the accident; he admitted that that exhibit was a fair representation of the conditions that existed on the day of the accident. (Tr. 127)

So there will be no misunderstanding on the part of the Court, all of the exhibits that have been referred to were taken two days after the accident.

Plaintiff appellee testified that on the day of the accident his daughter asked permission to use the truck in order to go to a mail box situated on a state highway shown on Defendant's Exhibit 1. In order to go to the mail box she had to go over this crossing. Her father granted her this permission. (Tr.

135) He testified that he had cautioned her to watch out for trains. (Tr. 136)

In order to meet any contention that the Last Clear Chance Doctrine is applicable in this case, appellant called as an expert Joseph Gaynor. This man was eminently qualified to testify as such. (Tr. 429-432) This witness testified that a train of this character, going at 50 miles per hour, could not be stopped in a distance of less than 1250 feet; at 55 miles an hour, a minimum distance of 1400 to 1450 feet; at 64 miles an hour, a minimum distance of 1800 to 1850 feet.

It will undoubtedly be contended by appellee that this truck was stationary on the crossing for a substantial period of time prior to being struck. The Court will recall the testimony of the witness, John J. O'Neill, to the effect that he saw her open the door of the truck, step out, close the door, and that she got about 10 feet from the truck before she was struck by it after the collision.

The witness Gaynor testified that if this train had been dynamited when 700 feet distant from the crossing, going at a speed of 50 miles per hour, it would take it 9.4 seconds to reach the crossing on a free run, and if braked it would take about $10\frac{1}{2}$ seconds. (Tr. 454) Traveling at 60 miles an hour the witness testi-

fied that on a free run it would require about 8 seconds to reach the crossing from 700 feet out. At 64 miles per hour it would traverse the 700 feet on a free run in about 7.4 seconds, and with an emergency braking in about $8\frac{1}{2}$ seconds.

Appellant at the close of plaintiff's case moved for a directed verdict upon the ground that there was no evidence of a substantial character or probative value which established any of the material allegations of the complaint. The motion was based upon the further ground that the deceased girl was guilty of negligence as a matter of law, and upon the further ground that the plaintiff himself was guilty of contributory negligence in permitting his daughter to drive this truck without a driver's license. (Tr. 355-364) This motion was denied by the Court. (Tr. 365)

At the close of all the evidence the appellant moved the Court for a directed verdict for the reasons assigned in the motion made at the close of plaintiff's case and upon the additional ground that the deceased girl was guilty of negligence in that she violated a positive statute of the State of Washington requiring the operator of an automobile to have it under such control as to be able to bring it to a stop within 10 feet of the closest rail. This motion was denied. (Tr. 517)

SPECIFICATIONS OF ERROR

I

The District Court erred in denying appellant's motion for a directed verdict at the close of appellee's case.

II

The District Court erred in denying appellant's motion for a directed verdict at the close of all of the evidence.

III

The District Court erred in denying appellant's motion for judgment notwithstanding the verdict or in the alternative for a new trial.

IV

The District Court erred in refusing to give appellant's Requested Instruction No. 8:

“Defendant's Requested Instruction No. 8:

I instruct you that under the laws of the State of Washington in force at the time of this accident it was unlawful for a person to cause or knowingly permit his child under the age of eighteen years to operate a motor vehicle upon a public highway as a vehicle operator unless such child has first obtained a vehicle operator's license. Said law further provides that no person shall authorize or knowingly permit a motor

vehicle owned by him or under his control to be operated by any person who is not legally licensed as an operator. If you find from the evidence in this case that Erna Mae Everett at the time in question did not have a vehicle operator's license and that the plaintiff herein knew that she did not have such license, and if you find that said plaintiff authorized or knowingly permitted his daughter to operate the vehicle in question, then I instruct you that the plaintiff violated the law above referred to and was guilty of negligence. If you further find that such negligence was the direct and proximate cause of his daughter's death then your verdict should be for the defendant." (Tr. 18-19)

V

The District Court erred in refusing to give that portion of appellant's Requested Instruction No. 3, or an instruction substantially similar thereto, which portion of said instruction reads as follows :

"The operators of the train had a right to assume, until the contrary appeared, that the occupant of such automobile, exercising reasonable care for her own safety, would give the train the right of way to which it was entitled under the law, and the operators of said train were not required to take any action intended to slow the speed of the train until they were aware that the said vehicle did not intend to give the train the superior right of way." (Tr. 19)

VI

The District Court erred in refusing to give appel-

lant's Requested Instruction No. 7, or an instruction substantially similar thereto, which instruction reads as follows:

“Defendant's Requested Instruction No. 7:

I instruct you that if the deceased in the operation of her automobile knew of the approach of the defendant's train, and could have stopped short of the tracks and thus avoided the accident, but rather attempted to beat the train across the track, that such action was negligence on her part. If you find from the evidence that the deceased died as the result of attempting to beat the defendant's train across said track then your verdict should be for the defendant.” (Tr. 19-20)

VII

The District Court erred in giving the following instruction:

“You are instructed that it is the law of the State of Washington that every engineer driving a locomotive on any railway who fails to ring the bell or sound the whistle upon such locomotive or cause the same to be rung or sounded at least 80 rods from any place where such railway crosses a traveled road or street on the same level, except in cities, or to continue ringing of such bell or sounding of such whistle until such locomotive has crossed such road or street, shall be guilty of a misdemeanor. Therefore, if you find from the evidence in this case that the engineer of defendant's railroad train, F. W. Scobee, failed

to ring the bell or sound the whistle upon defendant's locomotive at least 80 rods east of the O'Neill crossing, and failed to continue the ringing of such bell or the sounding of such whistle until the locomotive had crossed O'Neill Road, such failure would be negligence on the part of the defendant herein, and if such negligence proximately caused the death of Erna Mae Everett, it would entitle the plaintiff to a verdict in his favor, in the absence of contributory negligence on the part of Erna Mae Everett. You will be instructed on the various aspects of contributory negligence later on, and I have given you some instructions heretofore in these instructions." (Tr. 20)

VIII

The District Court erred in giving the following instruction:

"Now there is involved in this case what is known as the doctrine of last clear chance. It is permissible to use the doctrine only after you find, and you may not use it unless and until you first find, that in the events leading up to the accident in question, both the deceased and the defendant were negligent.

"The doctrine of last clear chance is divided into two phases to cover two separate possibilities: (1) that where the defendant actually saw the peril of the traveler on the highway and should have appreciated the danger and failed to exercise reasonable care to avoid injury, such failure made the defendant liable, although the traveler's negligence may have continued up to

the instant of the injury; and (2) that where the defendant did not actually see the peril of the traveler, but by keeping a reasonably careful lookout commensurate with the dangerous character of the agency and the locality should have seen the peril and appreciated it in time by the exercise of reasonable care to have avoided the injury, and failure to escape the injury results from failure to keep that lookout and exercise that care, the defendant was liable only when the traveler's negligence had terminated or eliminated or culminated in a situation of peril from which the traveler could not by the exercise of reasonable care extricate himself.

"Therefore, if either of the two conditions just mentioned are found by you to have existed with respect to the collision in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injuries suffered by the plaintiff, that is, on account of the death of Erna Mae Everett in this case, and proximately resulting from the accident, despite the negligence of the deceased." (Tr. 21-22)

IX

The District Court erred in giving the following instruction:

"Gentlemen of the jury, I overlooked one claim of negligence here of the plaintiff, and on that point I instruct you that if you find from the preponderance of the evidence that the defendant railway company negligently failed to main-

tain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking at the crossing, and you find that that negligence was the proximate cause of the death of Erna Mae Everett and you further find it appears that there was no contributory negligence on the part of Ena Mae Everett, then your verdict should be on that point for the plaintiff.” (Tr. 23)

X

The District Court erred in denying the defendant's motion to withdraw from jury consideration subdivision (g) of paragraph VI of the complaint reading as follows:

“Defendants negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to said crossing and immediately next to the wooden planking at said crossing.” (Tr. 499-500)

XI

The District Court erred in denying defendant's motion to withdraw from jury consideration subdivision (d) of paragraph VI of the complaint reading as follows:

“The defendant neglected and failed to sound

the crossing signals required by the statutes of the State of Washington as the locomotive approached said crossing by either blowing a whistle or sounding a bell of said locomotive." (Tr. 498)

XII

The District Court erred in refusing to permit defendant to prove under cross-examination of the plaintiff that on and prior to March 8, 1952, the deceased, Erna Mae Everett, did not have an operator's license to operate a motor vehicle upon a public highway in the State of Washington. (Tr. 158-165)

XIII

The District Court erred in sustaining the objection of plaintiff's counsel to defendant's offer to prove that on and prior to March 8, 1952, the deceased, Erna Mae Everett, did not have an operator's license to operate a motor vehicle upon a public highway in the State of Washington. (Tr. 166)

XIV

The District Court erred in denying the appellant's motion for a new trial upon the basis that the verdict was excessive.

SUMMARY OF ARGUMENT

1. The plaintiff's intestate was guilty of contributory negligence as a matter of law. Under the undisputed evidence in the case there were only two witnesses of the immediate approach of the truck to the crossing — the fireman and the engineer. Since the engineer was called as a witness by appellee and since he was not an adverse witness under the Federal Rules of Civil Procedure, plaintiff is bound by his testimony as to the whistle signals that were given; the distance of the Diesel locomotive from the crossing when he first observed the truck; the distance of the truck from the crossing when he first observed it. The giving of the whistle signals, as testified to by the engineer, is partially and substantially corroborated by plaintiff's witness, Lawrence Shaw O'Neill. The testimony of plaintiff's witness, John J. O'Neill, from which the inference is sought to be drawn that the statutory signals were not given, is negative in character. Even though the full statutory whistle signal was not given, the plaintiff's intestate was guilty of negligence as a matter of law since under the photographic exhibits introduced by defendant and acknowledged by plaintiff to be fair representations of the physical conditions on the day of the accident, it con-

clusively appears that for a minimum distance of 25 feet from the crossing the driver had an unobstructed view to the east of at least 686 feet; as a matter of fact these exhibits conclusively show that she had a much greater view.

2. With reference to the alleged negligence of the appellant concerning the conditions in and near the crossing, this was not an issue for jury determination since there is an utter absence of testimony that this condition had anything to do with the truck stalling on the crossing. Appellant urges that under the undisputed evidence in this case the alleged negligence of the railway company in maintaining the crossing was not the proximate cause of the accident.

3. This judgment can only be affirmed if it can be said from the whole record that the doctrine of Last Clear Chance was for jury determination. Appellant insists that there is no evidence in the record which justified the submission of this doctrine.

4. Aside from the foregoing, the District Court fell into error justifying and requiring a new trial in the particulars herein after discussed, and in any event the verdict is so excessive that it should be reduced.

ARGUMENT

SPECIFICATIONS OF ERROR NOS. 1, 2 AND 3

These specifications involve our basic contention that plaintiff's intestate was guilty of negligence as a matter of law and that no actionable negligence on the part of appellant is disclosed in the record.

As seen from appellant's statement of the case, three propositions were submitted to the jury:

(a) Was the appellant guilty of negligence in failing to give the statutory whistle signal?

(b) Was the appellant guilty of negligence in its maintenance of the crossing?

(c) The Last Clear Chance Doctrine.

The complaint specifically alleged that the truck was stalled on the crossing at the time it was struck by appellant's train. Appellant discusses these propositions in their order.

(a) Engineer Scobee, called as an adverse witness, testified that he began the giving of these signals at the whistle post. Since he had been dismissed as a party defendant it is appellant's contention that he was not adverse and that therefore appellee is bound by his testimony; as a matter of fact, the trial Court

ruled that this witness was not adverse. Witness this observation of the Court:

“THE COURT: I think the adverse party rule is set out in Rule 43, Subdivision (b), of Rules of Civil Procedure, and this witness is no longer, of course, an adverse party—

MR. McKEVITT: No.

THE COURT: He has been dismissed as such, he is not an adverse party, and he isn't an officer or managing agent of the Northern Pacific Railway Company, so that the only right you would have to cross-examine is under 43(b), which is:

‘A party may interrogate an unwilling or hostile witness by leading questions,’ and ‘A party may call an adverse party or an officer, director, or managing agent of a public or private corporation,’ but he is not in that class, and I don't think you would be justified in going any further in this line of examination.” (Tr. 243)

The testimony of the engineer and the fireman as to the giving of these whistle signals has already been set forth.

The testimony of plaintiff appellee's witness, Lawrence O'Neill, is to the effect that he heard two long blasts of the whistle followed by several short blasts. These are the same signals as described by the fireman and the engineer. The only point of difference

between their testimony and that of Lawrence O'Neill is as to the location of the Diesel when the two long blasts were sounded.

This being a diversity of citizenship case, the Federal Courts under the rule of *Erie R.R. Co. vs. Tompkins*, 304 U.S. 64, 82 L. ed. 1188, are governed by the case law of Washington where the cause of action arose.

The Supreme Court of the State of Washington has held that a party operating a motor vehicle approaching a railroad crossing may be guilty of contributory negligence as a matter of law even though the statutory whistle signals were not given.

Sadler vs. Northern Pacific Ry. Co., 118 Wash. 121, 203 Pac. 10.

In that case the plaintiff was a guest in a motor vehicle. The evidence disclosed that the train could have been seen for a distance of 70 feet back from the track 1000 feet away and in plenty of time for the plaintiff to have warned the driver. The Court said:

"The jury were also instructed that the purpose of imposing upon railway companies the duty of giving signals prior to reaching highway crossings, and in limiting their speed within city limits, is to give warning to those about to use such crossings and to enable the train crew

to have their engine and train in more sufficient control, but such duty so imposed upon railway companies does not relieve one about to use such crossings, whether he be the driver of the machine, or situated, as was the deceased, Sadler, on the front seat with the driver, of the duty to use reasonable care for his own protection, or the positive duty imposed upon one in the position of the deceased, Sadler, to look and listen as he approaches the railroad track, of which he has knowledge; and in this case, even if the jury should find that the speed at which this train was approaching was excessive, and that all of the signals which they find should have been given were not given, yet, if the deceased, Sadler, by exercising reasonable care in the way of looking and listening, or in the taking of such other precautions as a reasonably prudent man would take for his protection, could have otherwise seen or heard the approach of the train from the noise or sounds incident to its operation, if there was such noise or sound, then the fact that some signals were not given, or that the train was going at a rate of speed greater than that provided by the city ordinance, would not permit a recovery on behalf of the surviving widow; or, if the jury should find that the deceased, Sadler, failed to exercise that degree of care imposed upon him, she should not recover, irrespective of the negligence on the part of the defendants, or either of them.

“These instructions stated the law correctly, and in spite of these instructions the jury must have found that Sadler looked and listened as he approached the railroad track, and therefore exercised reasonable care, or took the same precau-

tions as a reasonably prudent man would have taken for his protection; and this in face of the fact, as testified to by Ball, the driver, that Sadler said nothing to him, and in face of the facts that the train could have been seen for a distance of seventy feet back from the track one thousand feet away, and in plenty of time to warn the driver, or to have left the truck. In face of these undisputed facts, we feel obliged to say that the matter of Sadler's contributory negligence was conclusively established and left no fact upon that question for the jury to determine."

The rule announced in the *Sadler* case was reaffirmed in the case of *Morris vs. Chicago, M., St. P. & Pac. R. Co.*, 1 Wash. (2) 587, 97 Pac. (2) 119, at page 124:

"It is contended by respondent that appellants were negligent in operating the train at an excessive speed, and in failing to blow a whistle or give any warning. We held in *Sadler v. Northern Pac. R. Co.*, 118 Wash. 121, 203 Pac. 10, that the deceased was guilty of contributory negligence, as a matter of law, in that he failed to exercise the degree of care imposed upon him, and that the suing widow could not recover, irrespective of the negligence of the defendants."

(b) With reference to the alleged negligence of the appellant in the maintenance of the crossing and the immediate approach thereto there is an utter absence of evidence that this condition caused the truck to stall. As has been pointed out, apart from the en-

gineer and the fireman there were no eye witnesses of the immediate approach of the truck to the crossing. If their testimony is accepted as being uncontrodicted, which appellant asserts it is, the crossing condition could not have been a proximate cause of the accident; it was only an incident thereto.

If, as undoubtedly will be contended by appellee, this truck was stalled on the crossing for an appreciable period of time, then the situation would seem to fall within the language of the Illinois Appellate Court in the case of *Stefan vs. Elgin, Joliet & Eastern Ry. Co.*, Appellate Court of Ill., 120 N.E. (2) 52:

“Syllabus 3. Even if roughness of crossing caused automobile engine to die so that automobile stalled in path of oncoming train, where motorist, after automobile stalled, saw train approaching when it was 900 feet away and did not attempt to get out of the automobile until the engine was about 30 feet away, condition of crossing was not the proximate cause of injuries sustained when train struck automobile.”

In the course of its opinion in that case the Court, at page 55, said:

“We shall assume but not decide that the condition of the crossing caused the automobile engine to die. Was the alleged negligence of the railway company in maintaining the crossing as it was the proximate cause of the accident? No

cases cited by the parties are of particular help on this question. Here again the plaintiff, after his car stalled, saw the train approaching when it was 900 feet away. We think reasonable men must agree that what transpired from the stalling of the car to the collision was not a natural unbroken sequence of events which the uneven crossing set in motion."

(c) The language of the complaint which invoked the Last Clear Chance Doctrine is contained in subdivisions (b) and (c) of paragraph VII of the complaint:

"(b) Defendant's servants operating said train, saw, or should have seen, that an unusually dangerous situation existed when plaintiff's vehicle, operated by Erna Mae Everett, stalled on said railroad track and said Erna Mae Everett was attempting to abandon and flee said vehicle. Yet, knowing that a failure to warn Erna Mae Everett would probably result in serious injury, the defendants proceed to run said train into said intersection and against plaintiff's said vehicle without previously giving any signal or warning by blowing the whistle or ringing the bell of the locomotive, or giving warning by way of any other device or kind whatsoever.

"(c) Defendants saw, or should have seen, that a collision with Erna Mae Everett was imminent and had the opportunity to realize and appreciate her danger, but the defendants, with reckless indifference to injurious consequences probable to result therefrom, failed to reduce the speed of said passenger train by applying full and sufficient braking power to the wheels of said locomotive and the cars following it * * *".

Appellant asserts that there is not a syllable of testimony in the record, either direct or by inference, which sustains this allegation.

The Doctrine of Last Clear Chance, as adopted by the Supreme Court of Washington, was clarified in the case of *Leftridge vs. Seattle*, 130 Wash. 541, 228 Pac. 302; the Court said:

“Going no farther back into the decisions than to *Mosso v. Stanton Co.*, 75 Wash. 220, 134 Pac. 941, L.R.A. 1916A, 943, we find that case endeavored to clarify the last clear chance rule and define two separate conditions under which it was applicable, and the rule is announced as (1) that where the defendant *actually* saw the peril of a traveler on the highway and should have appreciated the danger and failed to exercise reasonable care to avoid injury, such failure made the defendant liable, although the plaintiff’s negligence may have continued up to the instant of the injury; but (2) that where the defendant did not actually see the peril of the plaintiff, but by keeping a reasonably careful lookout commensurate with the dangerous character of the agency and the locality *should have seen* the peril and appreciated it in time, by the exercise of reasonable care, to have avoided the injury, and failure to escape the injury results from failure to keep that lookout and exercise that care, the defendant was liable only when the plaintiff’s negligence had terminated or culminated in a situation of peril from which the plaintiff could not, by the exercise of reasonable care, extricate himself.

“Thus we have two different situations to which

the last clear chance rule applies. In the one, the plaintiff's negligence may continue up to the time of the injury if the defendant *actually sees* the peril; in the second, the plaintiff's negligence must have terminated if the defendant did not actually see the peril, but by the exercise of reasonable care *should have seen it*."

Appellant asserts that the record is devoid of any testimony of a substantial character or probative value that would bring the case at bar under either branch of the doctrine as above annouced.

In the case of *Delsman vs. Bertotti*, 200 Wash. 380, 93 Pac. (2) 371, the Court used the following language:

"Appellant next argues that, conceding that appellant was guilty of contributory negligence, under the doctrine of last clear chance the court should have denied the challenge to the evidence and submitted that question to the jury, upon the theory that, under the first situation of the doctrine of last clear chance, as stated in *Leftridge v. Seattle*, 130 Wash. 541, 228 Pac. 302, a jury question was presented. *Whether or not any situation calling for the application of the doctrine of last clear chance is applicable in a given case, is a question of law to be determined by the court.*" (Italics supplied)

In *Thompson vs. Porter*, 21 Wash. (2) 449, 151 Pac. (2) 433, speaking of the second branch of the doctrine, the Supreme Court of Washington used the following language:

“It is our opinion that the trial judge rightly ruled that there was not sufficient evidence to take the case to the jury under the first division of the last clear chance rule.

“Appellant further contends that the case should have been sent to the jury under the second division of the rule. Under that division the defendant may be held liable under the doctrine of last clear chance, notwithstanding the negligence of the injured person and even if he did not see him, but should have seen his peril and appreciated it in time to have, by reasonable care, avoided the injury. But, under those circumstances, the defendant can *only* be held liable:

“‘* * * when the plaintiff’s negligence had terminated or culminated in a situation of peril from which the plaintiff could not, by the exercise of reasonable care, extricate himself.’

“In summing up the two situations to which the last clear chance applies, the court said, in the *Leftridge* case, and this is the paragraph of the opinion so frequently quoted in our own opinions:

“‘Thus we have two different situations to which the last clear chance rule applies. In the one, the plaintiff’s negligence may continue up to the time of the injury if the defendant *actually* sees the peril; in the second, the plaintiff’s negligence must have terminated if the defendant did not actually see the peril, but by the exercise of reasonable care *should have seen* it.’

“Certainly, in this case Thompson’s negligence

had not terminated, and it would seem equally certain that it had not culminated in a situation of peril from which he could not extricate himself. He could have stepped off the pavement at any instant. In fact, we have heretofore squarely so decided.

“ ‘In walking on the right hand side of the highway, the respondent violated the statutory provision (Rem. Rev. Stat., Sec. 6362-41 (P.C. Sec. 196-41), subd. (6)) which requires pedestrians on highways to travel on and along the left side of the highway, and that pedestrians upon meeting an oncoming vehicle shall step off the paved or main traveled portion of the highway. * * * His negligence never terminated nor culminated in a situation of peril from which he could not by the exercise of reasonable care extricate himself. His negligence continued up to the instant of the injury.’ Steen v. Hedstrom, 189 Wash. 75, 78, 63 P. (2d) 507.

“The appellant, however, urges that one who is oblivious to his danger is, in effect, as unable to extricate himself as one who is physically unable to do so. It is further said that it is just as reprehensible to run down a man who is apparently oblivious to his peril as it is to run down one who, through negligence, has gotten his foot stuck in the road and is obviously physically unable to extricate it. That this is so must be conceded. But, in applying the last clear chance rule, *we are not exclusively concerned with the negligence of the defendant in the action. In fact, we are primarily concerned with that party who seeks to have his own negligence excused by*

the application of the rule. The negligence of the man unable to extricate his foot has terminated. His negligence is remote, rather than proximate and casual. The man walking on the wrong side of the road in disobedience to the statute is not only negligent *per se* until and at the very moment of his injury, but, moreover, his obliviousness to his danger in so proceeding is in and of itself negligence. In fact, under the theory urged, if he should be run down, he would be in a better position to have his negligence excused, under the last clear chance rule, if he took no care whatever for his own safety than if he kept careful watch for cars coming up from behind; for, if he did that, he might have real difficulty in convincing a jury that he was mentally in a state of oblivion. (Italics supplied)

“If we should interpret the second provision of the rule of the *Leftridge* case as appellant urges us to do, it would seem that, in future cases of this type in which one was run down while walking on the wrong side of the highway, in disobedience of the statute and without paying any attention whatever to cars that might be coming up behind him, he would need only to testify that the visibility was good in order to make a case for the jury under the doctrine of last clear chance.”

The Court's attention is now directed to the case of *Coins vs. Wash. Motor Coach Co.*, 34 Wash. (2d) 1, 208 Pac. (2) 143. That case was one wherein a bus was stalled at night blocking the major portion of an arterial highway. The driver had flares in his bus and he was held to have been negligent in failing to place

them where they could be seen by drivers approaching from either direction. Plaintiff requested an instruction including both phases of the last clear chance doctrine which the trial court refused to give. The Supreme Court said:

“We think that the court was correct in its decision. In order for the first phase of the rule to apply, there must be evidence that the defendant *actually saw* the peril in time to have avoided it. Here, there is no evidence to contradict Kimmel’s assertion that, as soon as he saw the bus, he did what a reasonable man would have done to avoid running into it; put on the brakes, though to no avail. Even if Kimmel ought to have seen the bus before this time, that fact is not sufficient in itself to raise an inference that he did see it. *Thompson v. Porter*, 21 Wash. (2) 449, 151 Pac. (2) 433. For this reason, we do not think that the situation called for an instruction on the first phase of the rule.

“In order to bring a case within the second phase of the rule, it does not matter whether or not the defendant actually saw the peril so long as he should have seen it; but, in such a situation, the plaintiff’s negligence must either have terminated or culminated in a situation of peril from which he could not, with reasonable care, have extricated himself. In the present case, the bus driver’s negligence in failing to warn approaching automobiles of the peril had clearly not terminated, but continued up to the moment of impact; and while it is true he could not have extricated his bus from the ditch before the approaching Coins car had reached it, it is prob-

able that he could have averted the accident by taking proper precautions which it was well within his power to do. In such a situation, Kimmel having been unconscious of the peril, we are not of the opinion that the second phase of the rule was applicable.

“The judgment is affirmed.”

In *Everest vs. Riecken*, 30 Wash. (2) 683, 193 Pac. (2) 353, the Supreme Court of Washington used this language:

“We are concerned not with a last possible chance but with a last clear chance; and a clear chance to avoid a collision involves the element of sufficient time to appreciate the peril of the party unable to extricate himself and to take the necessary steps to avoid injuring him. As we said in *Steen v. Hedstrom*, *supra*:

“‘Last clear chance implies thought, appreciation, mental direction, and the lapse of sufficient time to effectually act upon the impulse to save another from injury’;

or, as was said in *McLeod v. Charleston Laundry Co.*, 106 W. Va. 361, 145 S.E. 756, and quoted with approval in *Juergens v. Front*, 111 W. Va. 670, 163 S.E. 618:

“‘The authorities are unanimous in holding * * * that there must be an appreciable interval of time intervening between the injury and the driver’s knowledge or notice of the * * * dangerous situation.’”

See also, *Bagwill v. Pacific Electric R. Co.*, 90 Cal. App. 114, 265 Pac. 517, where the appellate court of California said:

“ ‘Certainly the doctrine of last clear chance never meant a splitting of seconds when emergencies arise. There seems still to be some misconception of this doctrine. * * * It was not devised as a last resort to fasten liability on defendants. * * * We are not to tear down the facts of a case and rebuild the same so that, by a trimming down and tight-fitting operation, something can be constructed upon which may be fastened the claim of last clear chance. The words mean exactly as they indicate, namely, last *clear* chance, not possible chance.’ ”

In the recent case of *Stokes vs. Johnstone*, decided by the Supreme Court of the State of Washington on September 1, 1955 (Wash. Dec., Sept. 14, 1955, Vol. 147, No. 7, page 288), the Supreme Court of the State of Washington reaffirmed all of the principles set forth in the foregoing decisions.

Concerning this doctrine, this Honorable Court, speaking through Circuit Judge Garrecht in the case of *Deere vs. Southern Pacific Co.*, 123 Fed. (2) 438 (at page 443) used the following language:

“It must be kept in mind that the doctrine of last clear chance means just what the words im-

ply and that the very essence of the rule is that it is applicable only where, notwithstanding another's negligence, the defendant, after realizing, or where under the circumstances he should have realized, that that other party cannot escape (due either to unawareness or to physical inability), has a clear chance to avoid the accident by the exercise of ordinary care. It is an absolute 'requirement of the doctrine of last clear chance that the peril of the party who relies upon it be inescapable or that he be oblivious to it.' *Stewart v. Capital Transit Co.*, 70 App. D.C. 346, 108 F. 2d 1, 3. See, also, *Wallis v. Southern Pac. Co.*, 184 Cal. 662, 673, 195 P. 408, 15 A.L.R. 117. From the testimony above related, and from the evidence taken as a whole, the only reasonable conclusion is that Deere was fully cognizant of the approach of the train. In addition, he was not in a position from which he could not extricate himself. Therefore, it follows that the defendant did not have the later chance to avoid the accident, and that the doctrine of last clear chance, then, is unavailable to plaintiff. *Kansas City Southern R. Co. v. Ellzey*, 275 U.S. 236, 241, 48 S. Ct. 80, 72 L. Ed. 259; *McHugh v. Market St. Ry. Co.*, 29 Cal. App. 2d 737, 743, 85 P. 2d, 467. Plaintiff has utterly failed to sustain her burden of showing that the deceased could not have escaped injury by the exercise of ordinary care. *Young v. Southern Pac. Co.*, 189 Cal. 746, 755, 210 P. 259. * * *"

In addition to her negligent failure to yield the right of way to the train, appellee's intestate was guilty of negligence *per se* in that she violated Sec.

6360-104 Remington's Revised Statutes of Washington, which provides:

"Any person operating any vehicle * * * other than those specifically mentioned above, shall, upon approaching the intersection of any public highway with railroad or interurban grade crossing, reduce the speed of such vehicle to a rate of speed not to exceed that at which, considering view along such track in both directions, such vehicle can be brought to a complete stop not less than ten (10) feet from the nearest track in the event of an approaching train. * * *"

Appellant closes this discussion of the Last Clear Chance phase with this observation from the Supreme Court of the State of Washington in the case of *Zettler vs. Seattle*, 153 Wash. 179, 279 Pac. 57:

"The last clear chance doctrine is a very just and salutary rule to be applied in a proper case, but its misapplication is fraught with great danger and often leads to unjust results, because it always invites a jury to disregard or excuse contributory negligence which would otherwise bar the action."

ARGUMENT IN SUPPORT OF MOTION FOR NEW TRIAL

In the alternative, appellant asserts that a new trial should be granted for the following reasons:

SPECIFICATIONS OF ERROR NOS. 4, 12 AND 13

These specifications of error may be discussed under one heading.

As has already been disclosed, at the time plaintiff's intestate was driving this panel truck she did not have an operator's license under the laws of the State of Washington. In Revised Code of Washington, 46.20.230 (1937 c. 188, sec. 62; R.R.S. Sec. 6312-62) is found the following provision:

“Unlawfully permitting child to operate. It shall be unlawful for a person to cause or knowingly permit his child or ward under the age of eighteen years to operate a motor vehicle upon a public highway as a vehicle operator, unless such child or ward has first obtained a vehicle operator's license. No person shall employ a person to operate a motor vehicle who is not licensed as an operator. No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be operated by any person who is not legally licensed as an operator.”

In the case of *Atkins vs. Churchill*, 30 Wash. (2) 859, 194 Pac. (2) 364, is found the following language:

“In addition, there was ample evidence to warrant submission to the jury of the question of negligence of appellant in entrusting his automobile to an unlicensed minor. *Forman v. Shields*, 183 Wash. 333, 48 P. (2) 599; *Smith v. Nealey*, 162 Wash. 160, 298 Pac. 345. See, also, annotation, 168 A.L.R. 1364 *et seq.* In that annotation is collected the cases which support the general rule that the owner of a motor vehicle, who entrusts the vehicle in the hands of an unfit person, thereby enabling the latter to drive it, may be held liable for an injury negligently inflicted by the use made of the vehicle by its driver as a proximate result of the incompetency or unfitness of the driver, although the use being made of the vehicle at the time of the injury was beyond the scope of the owner’s consent. The authorities uniformly hold that it is negligence *per se* for the owner of a motor vehicle to entrust it to a minor under the age specified by statute. *The prohibitory enactment itself constitutes a conclusive declaration that an individual younger than the age designated is incompetent to drive a motor vehicle.*” (Italics supplied)

SPECIFICATION OF ERROR No. 5

Under the testimony of appellant’s engineer and fireman, appellant’s Requested Instruction No. 3 should have been given. This instruction involved the proposition that appellant’s train had the right of way under the law and that the operators thereof were not required to take any action for diminishing the speed of the train until such operators were rea-

sonably aware that the driver of the vehicle did not intend to give the train the right of way. No citation of authority is necessary to establish this proposition.

SPECIFICATION OF ERROR No. 6

Appellant's Requested Instruction No. 7 should have been given. There is substantial evidence in the record to justify the proposition that plaintiff's intestate was attempting to "beat" the train across the crossing.

SPECIFICATION OF ERROR No. 7

This specification deals with the assigned error of the Court in instructing the jury with reference to the statutory provisions of the Washington law re sounding of whistle signals at a point 80 rods from a crossing such as is involved here. This specification of error finds its complete justification in the case of *Sadler vs. Northern Pacific Railway Company, supra*.

SPECIFICATION OF ERROR No. 8

This specification deals with an instruction given by the Court wherein the jury was permitted to render a verdict in favor of the plaintiff if it found that appellant was guilty of negligence under the Last Clear Chance Doctrine.

This instruction was erroneous for two reasons:

(1) Under the state of the record as heretofore delineated there was no testimony of a substantial character or probative value to justify the submission of such an issue to the jury;

(2) Since, as under the decisions of the Supreme Court of the State of Washington heretofore referred to the application of this doctrine is a question of law to be first determined by the trial Court, it was erroneous for the trial Court to leave to jury consideration the question of whether or not the first branch of the Last Clear Chance Doctrine or the second branch of that doctrine, as stated by the Supreme Court of the State of Washington, applied.

SPECIFICATIONS OF ERROR NOS. 9 AND 10

This specification deals with the instruction given by the Court touching the alleged negligence of the appellant railway company in failing to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing immediately next to the wooden planking at the crossing, and defendant's motion to withdraw from jury consideration sub-division (g) of paragraph VI of the complaint already referred to. This proposition has al-

ready been discussed with particular reference to the case of *Stefan vs. Elgin, Joliet & Eastern Railway Co., supra.*

SPECIFICATION OF ERROR No. 11

This specification deals with the denial of the trial Court, upon motion of appellant, to withdraw from jury consideration subdivision (d) of paragraph VI of the complaint touching the alleged failure of the appellant to give the statutory crossing signals required by the statutes of the State of Washington. This specification has already been covered.

SPECIFICATION OF ERROR No. 14

This specification of error deals with appellant's motion for a new trial based upon the contention that the verdict was excessive. It has already been seen that general damages were awarded plaintiff for the death of his daughter in the sum of \$8,000.00. The girl would have been 17 years old in another month. She was a junior in high school. (Tr. 68-69) She was a good healthy girl, had good grades, sewed nicely, helped her dad with the farm work and was capable of doing much of the housework. (Tr. 336-337) There was no testimony as to the pecuniary value of her services.

The pertinent portion of the statute under which this action is based reads as follows:

“A father, or in case of the death or desertion of his family, the mother, may maintain an action as plaintiff for the injury or death of a child . . .” (*Hedrick v. Ilwaco R. & N. Co.*, 4 Wash. 400, 30 Pac. 714.)

In the case cited above it was pointed out that although at common law a parent could not recover for the wrongful death of his child, he could maintain an action for the loss of services of his minor child from the time of the injury to his death, and in speaking of the statute the court said:

“The object of the statute is to create a new and independent right of action for the loss of services subsequent to the decease of the child, which did not exist at common law.”

The court then went on to say:

“The measure of damages in such cases is the value of the child’s services from the time of the injury until he would have attained the age of majority, taken in connection with his prospects in life, less the cost of his support and maintenance.”

The reasoning in the *Hedrick* case is still being applied in the Washington courts.

In *Skidmore vs. Seattle*, 138 Wash. 343, 244 Pac. 545, the court said:

“We, of course, must recognize that the father cannot recover more than his actual pecuniary loss, since the doctrine of punitive damages has been repudiated by this court in its repeated decisions.”

The court, however, went on to say that the father could maintain an action for the injury or death of his child and that this meant substantial damages, measured as held in the early case of *Hedrick vs. Ilwaco R. & N. Co.*, cited above. Further discussing the *Hedrick* case the Supreme Court said:

“While this is a sound theoretical measure, it is, of course, one which is impossible of application with any degree of exactness in the vast majority of cases; but this measure of loss for the death of a minor is the only theoretical measure that can be adopted, having in mind that it is the actual pecuniary loss to the father that is the measure of his right of recovery. So we must apply such measure as best we can, and upon that theory approximate the father’s actual loss.”

In *Skeels vs. Davidson*, 18 Wash. (2) 358, 139 Pac. (2) 301, a comprehensive discussion of the question of damages for the wrongful death of a minor child is found, and on page 369 stated that the court was justified in instructing the jury as follows:

“You shall determine the value of the services

of this child from the date of the injury until he would have attained the age of majority, less the cost of his support and maintenance to his parents during this interval."

Also, at page 373-374 the court said:

"The interpretation of the statute creating the right of action of the respondent in this case, as made in the Hedrick case over fifty years ago, has ever since been recognized as valid, and, although the rule of damages therein declared has been somewhat liberalized under the stress of necessity, that interpretation is still binding upon us. Furthermore, in spite of the seeming absurdity of instructing juries to make a computation which, in many cases, it is wholly impossible for them to make, an extensive research has not revealed a satisfactory substitute.

"The chief practical objection to the measure of damages under discussion is the fear that, since it can rarely be applied with anything like certainty, it is likely to promote excessive verdicts. This difficulty is inherent in the matter, as in many other phases of the law of damages, such as, for example, where damages for pain, mental suffering, alienated affections, etc. must be assessed. In such cases, no exact standard of measurement can be prescribed. The measure of damages under discussion serves, at least, to impress upon juries that the law does not intend or contemplate the impossible thing of completely compensating a parent for the loss of a dearly beloved child."

While the court held that a strict application of this rule would result in injustice because applying it strictly would mean that only nominal damages could be recovered in the average case for the death of a child, it still holds to the ruling that an instruction along this line is correct and should be a guide to the jury in determining the amount of damages to be awarded for the wrongful death of a child. Applying this reasoning to the case at bar, appellant submits that there is nothing in this record to sustain a verdict of \$8,000.00 for the death of a child 17 years of age where there is no showing as to the earnings of said child or the cost of her support. Therefore, the only conclusion which can be reached is that the result was based on pure speculation, passion and prejudice and is completely out of proportion to the measure of damages contemplated by the cases and the general rule governing actions of this kind.

CONCLUSION

But one conclusion can be drawn from the undisputed evidence and from the uncontroverted physical facts disclosed by the record, namely, that the deceased driver was guilty of contributory negligence as a matter of law and that the trial Court should

have granted appellant's motion for a directed verdict, and, failing this, should have granted its motion to set aside the verdict and judgment and granted a new trial.

Respectfully submitted,

McKEVITT, SNYDER & THOMAS

Attorneys for Appellant.

Dated at Spokane, Washington, October 17, 1955.



IN THE

United States
Court of Appeals
FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Appellant,

vs.

ERNEST EVERETT,

Appellee.

*Appeal from the District Court of the United States
for the Eastern District of Washington
Northern Division*

HON. SAM M. DRIVER, *Judge*

BRIEF OF APPELLEE

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IN THE
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*Appeal from the District Court of the United States
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HON. SAM M. DRIVER, *Judge*

BRIEF OF APPELLEE

JURISDICTION

The Appellee accepts the jurisdictional statement
of the Appellant.

RESTATEMENT OF THE CASE

The Appellant's Statement of the Case is controverted in part as incomplete. A full exposition of all of the facts presented to the jury is necessary for an understanding of the situation at hand as it truly came to pass.

As Appellant has stated, this is a crossing case involving a collision between plaintiff's panel truck being driven by his sixteen (almost seventeen) year old daughter, and defendant's passenger train. The accident happened about three o'clock in the afternoon on a clear, dry day, at a place approximately 4.75 miles east of Ellensburg, Washington. Defendant's Exhibit 1 adequately depicts the physical layout of defendant's trackage and O'Neill Road as it approached and crossed over the track.

A synthesis from testimony and physical evidence designed to reconstruct the factual situation so that appropriate rules of law may be applied thereto is always somewhat difficult, and it has been made particularly so here, since we are dealing with a constantly altering speed time and distance relationship between the moving train and the panel truck. However, there were only five surviving witnesses, including defendant's Exhibit No. 36—the speed tape—to the actual collision, and the testimony of those witnesses will be considered individually, commencing arbitrarily with Mr. Scobee.

Mr. Scobee said that he was operating his train in a westerly direction at a speed of sixty miles per hour as he approached the railroad whistle post, one thousand three hundred and twenty-three feet east of O'Neill crossing; (Tr. 250) that he gave two long blasts of the whistle and immediately the panel truck appeared, emerging from a kind of blind area behind the Milwaukee viaduct piers about twenty-five feet south of the crossing, going north. (Tr. 256) It was Mr. Scobee's recollection that at that moment he was two or three hundred feet east of the Milwaukee overpass, or nine hundred to a thousand feet east of O'Neill crossing. (Tr. 252-6) The speed of the truck was elsewhere estimated at ten miles per hour. (Tr. 416) Mr. Scobee said that upon observing the truck he made a service, as distinguished from an emergency, application of his brakes. (Tr. 256, 404) He felt the braking action of the train take hold and then the truck momentarily stopped or slowed down clear of the crossing. (Tr. 257, 404) He released the brakes and immediately the truck bucked up on the tracks and stalled there. Scobee testified that at this moment he was crossing under the Milwaukee viaduct and was approximately six hundred feet east of the crossing. He applied full emergency braking to the train, crashed into the stalled truck and continued down the track some sixteen hundred feet west of the crossing. The last thing he remembered seeing, just prior to the impact, was the left front door of the truck being opened and the Everett girl's head emerging.

The testimony of the fireman, Mr. Harvey Glen Williams, was substantially similar to that given by Mr. Scobee. He said the engineer gave two long blasts of the whistle when the train was at or very near the whistling post. (Tr. 417) He saw the truck for the first time when the train was at a place approximately one hundred feet east of the viaduct, and at that time the truck was fifteen or twenty feet south of the crossing, moving at a speed of about ten miles per hour. (Tr. 416) He stated that as the truck approached the crossing "it slowed down, very slow, or may have come to a stop, I don't know," and he then observed the truck jump or jerk ahead up onto the track and stall there. (Tr. 418) From his position in the cab he could see the girl apparently having some kind of trouble with the gear shift lever. He saw some black smoke coming out from the truck's exhaust pipe and he then saw the girl get out of the truck, start to shut the door and take three or four steps running away from the train toward the west.

The testimony of John J. and Lawrence O'Neill contradicted that of the engineer and fireman as to the place where the first whistle sound was loosed. (Tr. 293-303) Both O'Neills testified unequivocally that the train gave no warning whistle of any kind prior to the time the train was emerging from the underpass, or, in other words, their testimony established the fact that the train did not sound its whistle one thousand three hundred and twenty-three feet east of the crossing, and continue to sound it until

the train intersected the crossing, as it is required to do by statute in the State of Washington, (R.C.W. 81.48.010, Tr. 523, 524); that on the contrary, the train failed and neglected to sound the whistle until it was something appreciably less than six hundred eighty feet east of the crossing.

John O'Neill further stated that there was no noticeable slackening of the speed of the train from the time he first saw it until after it reached the crossing. (Tr. 295) Lawrence O'Neill testified that he noticed no slowing of the train during any of the time his attention was directed towards it. This witness also said that defendant's Exhibit No. 30—a panoramic photo—was a fair representation of the condition of the south approach to the crossing with reference to the absence of ballast, or dirt, between the road-bed and the planking adjacent to the track. (Tr. 313) He enlarged upon this on being questioned by saying that when he drives over this crossing from south to north he always goes to the left-hand side of the road in an effort to avoid the big hump caused by the exposed planking. (Tr. 318)

Along this same line it may be recalled that Mr. Everett testified that a few days after the accident he took a measurement of this defect and found that there was a jump-up of about five inches from the bed of the county road to the top of the planking next to the south side of the track. (Tr. 96) Accord-

ing to Mr. Everett, one had to shift down and apply additional acceleration to the car else there was "a very good chance of stalling your car." (Tr. 103, 4)

Joseph F. Gaynor testified for the defendant as an expert witness. He was a graduate electrical engineer and had been superintendent of electrical operations for the Great Northern Railroad Company for the past fourteen years. He identified defendant's Exhibit 36—the speed tape—described its operation and function, and decoded its markings into a pictorial language understandable to all. In Appellee's judgment, the information on the speed tape was absolutely correct and irrefutable. It is unchallengable, and stands unchallenged as an on-the-spot, exact mechanical record of the precise manner in which defendant's train was operated from the city of Ellensburg to the place where the train stopped after the collision at O'Neill's crossing. It accurately recorded the speed at which the train traveled, the various distances covered at various speeds, and the various points where braking power was applied to the train and deceleration occurred. Great weight should have been, and undoubtedly was, given this evidence by the jury. As Mr. Gaynor aptly said, "the speed tape will protect an engineer or hang him if he is exceeding or going outside of the rules." (Tr. 439) In passing, it does not strike Appellee as inappropriate to point out that in spite of the obvious importance and meaningfulness of the evidence made

plain by this mute witness, one can read the Appellant's Brief from beginning to end, and back again, without finding so much as a single reference even to the existence of a speed tape. The blunt reason for its pointed absence is the fact that the speed tape flatly contradicts the testimony of the engineer and the fireman concerning the circumstances of the collision, and what they did and when they did it. From the tape Gaynor was able to determine that the train started at Ellensburg, or Milepost Zero, and at one mile out, was going forty-five miles per hour. Two miles out it was moving at fifty-five miles per hour, and at two and one-half miles out the train had slowed to around thirty-seven to thirty-eight miles per hour and held that speed for about one-fourth of a mile. (Tr. 471) From that point on the speed increased at a fairly even rate to sixty miles per hour. When sixty miles per hour was reached, the acceleration was arrested by a service application of the brakes, and the speed of sixty miles per hour was maintained for one-half mile. At that time, which was one-half mile, or two thousand six hundred forty feet, west of the O'Neill crossing, the service application was released, the train accelerated to sixty-four miles per hour and maintained that speed undiminished by any type of braking—service, emergency or otherwise—to the point of impact with the truck, immediately after which the speed started dropping off to zero miles per hour, and stopped at a distance of about one-fourth of a mile from the crossing.

On these facts the court submitted to the jury three allegations of negligence on the part of defendant which proximately caused the death of the minor and plaintiff's resultant damage. These allegations were:

1. That the defendant neglected and failed to sound the crossing signals required by the statutes of the State of Washington as the locomotive approached the said crossing, by either blowing a whistle or sounding a bell on the locomotive;
2. The defendant negligently failed to stop the train, slacken its speed or give timely or adequate warning of its approach to the crossing, when the persons operating the train saw, or by the exercise of ordinary care should have seen, Erna Mae Everett, and plaintiff's panel truck in a position of imminent peril of being struck by the train;
3. That the defendant negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking at the crossing.

ARGUMENT

ANSWER TO SPECIFICATIONS OF ERROR NOS. I, II AND III

Appellant urges by the above numbered Specifications that the District Court erred in denying Appellant's motion for a directed verdict at the close of Appellant's case, at the close of all of the evidence, and further erred in denying Appellant's motion for a judgment notwithstanding the verdict, or in the alternative for a new trial. These Specifications are predicated on Appellant's contentions that there was no actionable negligence on Appellee's part; that Erna Mae Everett was guilty of contributory negligence as a matter of law, and that the doctrine of last clear chance is not applicable to the facts at hand. It is a beguiling procedure to compare the factual situations found in a variety of cited cases to the facts of a case at hand, and argue that since the fact situations are similar the results obtained must be identical. The truth is, though, that each case has dissimilar facts of its own against which must be applied preconceived concepts of law for a proper result to obtain. In this connection the case of *Scott v. Pacific Power & Light Company*, 178 Wash. 647; 35 P. 2d 749, gives a clear expression of the rule of law with which we are dealing herein:

“Upon an issue as to contributory negligence, where there is evidence and inferences to be deduced therefrom by which reasonable men may

arrive at different conclusions, contributory negligence is a question for the jury. In passing upon that question, we must accept as true that view of the evidence most favorable to the respondent. *Bryant v. Hartford Eastern Ry. Co.*, 158 Wash. 389, 290 Pac. 874.

“‘In but two classes of cases may the question of negligence be determined by the court as a conclusion of law: (1) Where the circumstances of the case are such that the standard of duty is fixed, and the measure of duty defined, by law, and is the same under all circumstances; (2) where the facts are undisputed and but one reasonable inference can be drawn from them. (Citing cases)

“‘And where the minds of reasonable men may differ, the legal sufficiency is for the jury.’ (Citing case)

“In determining the question of contributory negligence, due care or ordinary prudence under the circumstances is the only test. (Citing cases) The existence of contributory negligence must be judged by respondent’s condition and surroundings at the time of the accident, and whether, under the circumstances, he acted as a reasonably prudent man would have done.

“‘After an accident happens it is always easy to see many ways by which it could have been avoided, but such considerations do not usually afford a correct test of negligence. A victim of an accident is entitled to have his conduct judged by the circumstances surrounding him at the time of the accident—by the conditions as they appeared to one in his then situation—and if his conduct when so

judged appears to be that of a reasonably prudent person, he cannot be said to be guilty of negligence.' *Hull v. Seattle, Renton & Southern R. Co.*, 60 Wash. 162, 110 Pac. 804.

“Ordinarily, the question of contributory negligence is for the jury. A court will determine the question only when but one reasonable conclusion can be reached from a given state of facts.”

Appellant attempts to come within the confines of the above rule by contending that Appellee, and presumably the jury likewise, was in some manner bound by the testimony of the engineer and fireman. Scobee was dismissed as a party defendant without objection on Appellant's part, and the testimony of those who contradicted and testimonially impeached him, was heard by the jury without objection being made. Appellant cites no authority to support this strange theory, and Appellee has found no case which discusses pro or con Appellant's proposal. The reason may well be that to date no such idea concerning the law of evidence has been put forward for serious consideration by an Appellate Court. What has been said time and again in cases was said in *Cunningham v. Thompson*, 277 S.W. 2d 602. (Mo.) p. 610:

“In this case defendant's employees testified they did not see plaintiff approach the crossing. Of course, the jury was not obliged to believe the employees' testimony. . . .”

In the case at hand the jury was in no way obligated to believe all that to which Scobee testified. They could well have believed that he did see the approach of the truck and did make a service application of the brakes, as he so testified. They could likewise have believed that he was mistaken in his estimate of his position when he saw the girl and made the application. They could have rejected his testimony that he was at that moment nine hundred to one thousand feet away from the crossing and accepted the testimony of the speed tape which placed him at that moment, a mile away from the crossing. The jury may have believed Scobee when he said he watched the truck and when it paused or stopped at the crossing he released the service application of the brake, and, by the same token believed the speed tape when it placed the train two thousand six hundred forty feet away from the crossing at the instant the service application of braking was released. If such were the facts accepted by the jury, it would make no real difference whether the girl saw the train, couldn't see the train or was oblivious to the train (possibilities which the death of the girl bars us now from ever knowing), since in any event she would have had ample time to get across the track had she not stalled thereon. It seems apparent that reasonable minds could find a total lack of contributory negligence in the act of attempting to drive a panel truck across a railroad track with a train approaching one-half mile away.

As to the place where the train's warning whistle was blown, the jury was as free to believe the two O'Neills when they said it was first heard five or six hundred feet west of the crossing, as they were free to disbelieve the engineer and the fireman when they said it was first blown one thousand three hundred twenty-three feet west of the crossing. And had the whistle been blown at the whistle post instead of someplace between the viaduct and the crossing, it may reasonably be inferred that the girl would have had time to safely flee her vehicle.

With reference to Appellee's claim that the defendant negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading to the crossing and immediately next to the wooden planking of the crossing, Appellant, in his Brief at page 47 states, that there is an utter absence of evidence that this condition caused the truck to stall. Appellee submits that Appellant errs. Defendant's Exhibit No. 30, along with several of the other photographs, show the condition of the south approach to the crossing and show the absence of dirt between the roadbed and the planking. Mr. Everett testified that he measured this defect and found that there was a five-inch jump-up from the roadbed to the top of the planking, and further testified that in maneuvering this stretch of road one had to shift down and "goose" the engine, else there was a very good chance of stalling the car. In addition, the engineer and fire-

man stated that the car appeared to “buck up” onto the crossing and stop, and that a cloud of black smoke came out of the exhaust pipe. In this mechanized day and age every man, woman and adolescent child knows that if the forward motion of slowly moving rear wheels of an automobile is suddenly stopped and the clutch not disengaged the engine of the vehicle necessarily must, and will, stall.

A case in point is *Moore v. Atlantic Coast Line Railroad Co.*, 201 North Carolina 26, 158 S.E. 556. This was also a crossing case involving defendant’s train and a bakery wagon which stalled on the railroad track. There was evidence that the rails projected two or three inches above the planking on the crossing. The question arose as to the defendant’s negligence in the maintenance of the crossing. In discussing this question, the court stated in part:

“It is hardly open to doubt that, if the engine had not stopped running, the truck would have passed the crossing in safety. Why the engine stopped is left in doubt. We see no convincing evidence that it was due to the driver’s negligence. It may more reasonably be attributed to the condition of the crossing.”

The case that Appellant cites on page 48 of his Brief in support of his views on this subject, to-wit: *Stephen v. Elgin, Joliet & Eastern Railway Co.*, App. Crt. of Ill. 120 N.E. 2d 52, does not appear to be in point. In that case it was apparently found as a fact

that the plaintiff, after his car had stalled, saw the train approaching when it was nine hundred feet away. In the case at hand there is no evidence whatsoever that the deceased girl at any time saw the approaching train when it was a sufficient distance away to permit her escape.

See also *Cashatt v. Brown*, 211 North Carolina 367, 190 S. E. 480.

Appellant objects strenuously to the submission of the doctrine of last clear chance to the jury by the trial court, asserting that the record is devoid of any testimony of a substantial character or probative value that would bring the case at bar under either branch of the doctrine. At the outset Appellee agrees with Appellant, that whether or not any situation calling for the application of the doctrine of last clear chance is applicable in a given case, is a question of law to be determined by the court. See: *Delsman v. Bertotti*, 200 Wash. 380, 93 P. 2d 371. As to the doctrine itself, it is basically a double-phased, logical refinement or further probing of the concept of proximate cause as it relates to negligence and contributory negligence. As Appellant has indicated in his Brief, the case of *Leftridge v. Seattle*, 130 Wash. 541, 228 P. 302, contains the accepted form of the rule and has defined phase one thusly:

“(1) That where the defendant actually saw the peril of the traveler on the highway and

should have appreciated the danger, and failed to exercise reasonable care to avoid injury, such failure made the defendant liable, although the plaintiff's negligence may have continued up to the instant of the injury."

Phase two is defined in the *Leftridge* case as follows:

"(2) That where the defendant did not actually see the peril of the plaintiff, but by keeping a reasonably careful lookout commensurate with the dangerous character of the agency and the locality, should have seen the peril and appreciated it in time by the exercise of reasonable care to have avoided the injury, and failure to escape the injury results from failure to keep that lookout and exercise that care, the defendant was liable only when the plaintiff's negligence had terminated or culminated in a situation of peril from which the plaintiff could not, by the exercise of reasonable care, extricate himself."

Much of what has been previously said herein goes to support Appellee's contention that both phase one and phase two of the doctrine were properly submitted to the jury by the court. If the jury, in the exercise of its function, found that the deceased girl was guilty of antecedent negligence by driving the panel truck on the railroad track with knowledge that a train was approaching approximately one-half mile distant, and if the jury further found, as has been shown it reasonably could, that the engineer saw the girl drive on and stall on the tracks immediately after releasing his service application of braking when he

was, according to the speed tape, one-half mile away, and the engineer did not apply any braking till within four hundred feet of the crossing, and did not blow a warning whistle until within five to six hundred feet of the crossing, the Appellant would plainly be liable under the doctrine of last clear chance, whether plaintiff's negligence may have continued up to the instant of the injury, or not. If, on the other hand, the jury found, as has been shown it could have found, that the deceased attempted to cross the tracks without looking toward the west for an approaching train, and her negligence consisted of so doing, that antecedent negligence would have terminated or culminated in a situation of peril when her truck became stalled on the tracks. If, under those facts, the jury rejected Scobee's testimony that he actually saw the truck from the time it approached the crossing until it was struck, but believed on the contrary that he did not actually see the peril of the plaintiff's minor daughter, but by keeping a reasonable, careful lookout commensurate with the dangerous character of the agency and locality should have seen the peril, and by the exercise of reasonable care could have stopped his train prior to the collision or given the statutory warning whistle one thousand three hundred twenty-three feet from the crossing, and by so doing have avoided the injury, Appellant was liable under phase two of the doctrine. Consequently, Appellee respectfully submits that the trial court properly analyzed the potentials of the disputed factual situation at

hand and correctly submitted both phase one and phase two of the doctrine of last clear chance.

ANSWER TO SPECIFICATIONS OF ERROR
Nos. IV, XII AND XIII

Appellant claims by these Specifications that the district Court erred in refusing to give Appellant's requested instruction No. 8 to the effect that if the jury found that the deceased at the time in question did not have a vehicle operator's license and that the plaintiff, her father, knew that she didn't have one, but permitted the girl to operate the vehicle, then the plaintiff violated a specific Washington statute and was guilty of negligence *per se*. Error is further claimed in not allowing defendant to prove under cross-examination that the deceased did not have an operator's license and in sustaining plaintiff's objection to defendant's offer to prove that the girl did not have an operator's license. The answer to these specifications is found in the *Revised Code of Washington* 46.20.030, which states in part as follows:

“The director shall not issue a vehicle operator's license to the following: (1) Any person under the age of sixteen years;”

and in the case cited by Appellant in his Brief at page 60, *Atkins v. Churchill*, 30 Wash. 859, 194 P. 2d 364. In that case the defendant entrusted his vehicle to his daughter and five other young people so that they could attend some social function. Quoting from page 864 of the decision:

“None of these six persons was more than fifteen years of age, and none had an automobile operator’s license or was qualified under the statute which provides that a vehicle operator’s license shall not issue to any person under the age of sixteen years.”

At page 865 of the opinion, this is found:

“The authorities uniformly hold that it is negligence per se for the owner of a motor vehicle to entrust it to a minor under the age specified by statute. The prohibitory enactment itself constitutes a conclusive declaration that an individual younger than the age designated is incompetent to drive a motor vehicle.

“The negligence of appellant was submitted to the jury on two theories: (1) Entrusting the automobile to an unlicensed minor under the age where one is eligible to secure such license.”

Plainly the writer of this decision was concerning himself with *Section 46.20.030 R.C.W.*, supra and not *46.20.230 R.C.W.* cited on page 60 of Appellant’s Brief. The District Judge analyzed this contention at time of trial when it was first raised, probably as clearly as possible (Tr. p. 164):

“Now, the part that Mr. McKevitt read, the general rule is stated that:

‘The owner of a motor vehicle who entrusts the vehicle in the hands of an unfit person, thereby enabling the latter to drive it, may be held liable for an injury negligently in-

flicted by the use of the vehicle by its driver as a proximate result of incompetency or unfitness of the driver, although the use being made of the vehicle at the time of injury was beyond the scope of the owner's consent. The authorities uniformly hold that it is negligence per se for the owner of a motor vehicle to entrust it to a minor under the age specified by statute.'

"Now, I take that to be under the age specified by statute, under the age of 16, and not under the age of 18 years. The 18 years simply provides that no parent shall permit a minor under 18 to drive a car unless they have a license. I think that is apparent from the next sentence:

'The prohibitory enactment itself constitutes a conclusive declaration that the individual younger than the age designated is incompetent to drive a motor vehicle.'

"Now, how could the law conclusively declare a person under 18 is incompetent to drive a motor vehicle if their parent chooses to turn around and give them a license to drive one? There is no conclusive declaration that a person 17 years of age, certainly, is incapable of driving a motor vehicle. If that were the policy of the law, there wouldn't be any license issued to them. So that I think this applies only to those cases where the minor is of the age where they are not eligible under any circumstances to procure a driver's license, and I think under the rule relied upon here, that is immaterial whether or not this girl had a license."

ANSWER TO SPECIFICATION OF ERROR NO. V

Appellant contends here that the District Court erred in refusing to give a portion of Appellant's requested instruction No. 3. Appellant did not include this Specification in his Statement of Points on Which Appellant Relies. Such a failure is violative of Rule 19, subparagraph 6 of the above court, (mis-called Rule 17, subparagraph 6 by Appellant). Consequently, Specification of Error No. V should not be considered by this court. Quoting from Rule 19, subparagraph 6:

“ . . . If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record and the points so stated.”

In this connection see also:

Bank of America National Trust & Savings Assn. v. Commissioner of Internal Revenue, 126 F. 2d p. 48 (Ninth Circuit);

Western National Insurance Co. v. LeClare, 163 F. 2d 337 (Ninth Circuit);

United States v. Gallagher, 151 F. 2d 556 (Ninth Circuit).

In any event, the Specification cannot be well taken because the District Court did, in fact, give the requested instruction at page 527 of the Transcript:

“Now, if you find from the evidence that the train and automobile were simultaneously approaching the crossing in question, then the operators of the locomotive and (618) train, had a right to assume, until the contrary became evident, that Erna Mae Everett would give the train the right-of-way, and the engineer was not required to attempt to slow or bring to a stop his train because the automobile may have been approaching the track.”

ANSWER TO SPECIFICATION OF ERROR NO. VI

Appellant contends herein that the District Court erred in refusing to give defendant's requested instruction No. 7 to the effect that if the jury found from the evidence that the deceased died as the result of attempting to beat defendant's train across said track then the verdict should be for the defendant. Here again the Specification of Error was not included in Appellant's Statement of Points on Which Appellant Relies and is, as was Specification of Error No. V, in violation of this Court's Rule 19, subparagraph 6, and likewise should not be considered by the court. However, the Specification otherwise has no merit because there was certainly no evidence or inference that the deceased was attempting to beat the train across the crossing. Appellant's flat statement that there is substantial evidence in the record to jus-

tify this proposition is a figment of its imagination. The only testimony on this subject was that of the engineer and the fireman who testified that the girl approached the track at a slow speed, approximately ten miles per hour, slowed or stopped just south of the crossing and then "bucked up" onto the track and stalled there. It is ridiculous to assert that such testimony could give rise to any inference that the deceased girl was attempting to race the train in an effort to beat it across the crossing. In any event, Appellee respectfully submits that the requested instruction was substantially covered by the District Court by the following instruction found at page 526 of the Transcript:

"Now, under the laws of this state, the railway company has the right-of-way over a motorist at a crossing such as here involved, that is to say, a crossing at grade, and the driver of a motor vehicle is legally required to accord such right-of-way to an approaching train when both automobile and train are approaching the crossing simultaneously."

ANSWER TO SPECIFICATION OF ERROR No. VII

Herein the Appellant claims error in the giving of the instruction set out on pages 36, 37 of Appellant's Brief, (Tr. 20) to the effect that it is the law of the state of Washington that an engineer who fails to ring the bell or sound the whistle on a locomotive at least eighty rods from any place where the railway

crosses a road or fails to continue ringing the bell or sounding the whistle until the locomotive has crossed the road, shall be guilty of a misdemeanor. The jury was charged that if they found that the engineer, F. W. Scobee, had failed to ring the bell or sound the whistle as required by the statute, such failure would constitute negligence, and "if such negligence proximately caused the death of Erna Mae Everett, it would entitle the plaintiff to a verdict in his favor in the absence of contributory negligence on the part of Erna Mae Everett." This was an absolutely correct statement of law to which the case of *Sadler v. Northern Pacific Railway Company*, 118 Wash. 121, 203 P. 10, does no violence whatsoever. The opinion in the *Sadler* case does not set out the instructions given to the jury, but it is indicated that the jury was instructed with reference to the negligence in failing to give warning to those about to use such crossing. The court specifically stated on page 130 of that opinion: "These instructions stated the law correctly." The whole point in the *Sadler* case was that the court found that upon the particular set of facts presented therein the contributory negligence of the deceased plaintiff was so conclusively established as to leave no question for the jury. That contingency was plainly covered in the disputed instruction by the charge that such negligence must exist in the absence of contributory negligence on the part of Erna Mae Everett and, further, such negligence must be the proximate cause of the death of the girl.

ANSWER TO SPECIFICATION OF ERROR NO. VIII

Here Appellant claims error in the District Court's instruction to the jury with reference to the doctrine of last clear chance. This Specification has been answered in Appellee's Answer to Specifications of Error Nos. I, II and III.

ANSWER TO SPECIFICATIONS OF ERROR NOS. IX AND X

These Specifications have likewise been dealt with and answered in Appellee's Answer to Specifications of Error Nos. I, II and III.

ANSWER TO SPECIFICATION OF ERROR NO. XI

Appellant claims that the District Court erred in submitting to the jury Appellee's allegation of negligence predicated upon the defendant's failure to sound the crossing signals required by the statutes of the state of Washington as the locomotive approached said crossing, by either blowing a whistle or sounding a bell of said locomotive. The answer to this specification has been thoroughly made in Appellee's Answer to Specifications of Error Nos. I, II, III and VII herein, and we will not therefore further prolong this Brief by additional answer.

ANSWER TO SPECIFICATION OF ERROR NO. XIV

Here Appellant claims error in the denial of Appellant's motion for a new trial upon the ground that the verdict was excessive. To give some brief factual

background, Erna Mae Everett was sixteen years and eleven months old at the time she was killed. She attended high school and lived at home with her family on a 76-acre farm. This was an ordinary, hard-working family, in no sense of the word well off, but able to take care of itself. She was an attractive, physically healthy girl, and was in the process of making her spring wardrobe in her domestic science class at high school, where she consistently received good marks. She enjoyed helping her father with the farm work and actually did a considerable portion of that work. She helped her mother when called upon to do so and was generally a good, healthy, willing girl, and a plain asset to any family unit. The District Court properly instructed the jury as to the measure of damages in cases such as this. (Tr. p. 530) There are a number of Washington cases which ably discuss this question of damages, with the case of *Skeels v. Davidson*, 18 Wash. 2d 358, 139 P. 2d 301 giving probably the best analysis of the whole situation. That case involved the death of a six and one-half year old boy whose father was awarded damages in the sum of \$1,125.00. Therein the court stated in part, commencing at page 367, as follows:

“There is, perhaps, no other phase of the law of damages which is in so unsatisfactory a state as that concerned with the rule governing damages for the wrongful death of a child, under a statute such as our own which creates the right of action, but prescribes no measure of recovery. . . .

“ ‘The object of the statute is to create a new and independent right of action for the loss of services subsequent to the decease of the child, which did not exist at common law.’
 “Accordingly, the court quite naturally arrived at the following conclusion :

“ ‘The measure of damages in such cases is the value of the child’s services from the time of the injury until he would have attained the age of majority, taken in connection with his prospects in life, less the cost of his support and maintenance.’

“ ‘This court and the majority of state courts—for this interpretation has been quite general—have attempted to apply this rule ever since. This court, like others, has long realized that the rule is not satisfactory, and in many cases wholly impractical. . . .

“ ‘It is a matter of common knowledge that, previous to the present war at least, such a computation as the jury was directed to make would result in no damages, except in the cases of a few gifted children employed in the entertainment field. . . .

“ ‘In speaking of the decisions of other states, the author of the opinion said :

“ ‘. . . in principle they hold that it is the purpose and intent of the statutes to provide for the award to the parents of substantial damages in all cases where the death of their child is caused by the negligence of another.’

“This broad generalization was not new in our case law. Substantially, the same statement was made in the opinion in *Atrops v. Costello*, *supra*, decided in 1894. It is clearly made one of the grounds of decision in the opinion in *Sweeten v. Pacific Power & Light Co.*, 88 Wash. 679, 153 Pac. 1054. In sustaining an award of \$2,593, with respect to the death of an eight year old boy, Judge Ellis, speaking for the court said:

“ ‘The claim that there was a fatal lack of proof, in that there was no evidence as to the probable value of the services of the child had he lived to his majority, is without merit. In such a case it is within the province of the jury, knowing the age, health and capacity of the child and the situation of the parent, to form an estimate of the pecuniary loss to the parent, present or prospective, resulting from the death of the child, and thereon award substantial damages. . . . In the nature of the case, direct evidence of specific pecuniary loss would be impracticable, not to say impossible. *To hold that, without such direct evidence, no recovery beyond nominal damages could be had, would render nugatory the statute permitting a recovery for wrongful death . . . , as applied to the loss of a child of tender years.*’ ”

In the case of *Scholz v. Leuer*, 7 Wash. 2d 76, 109 P. 2d 294, the court considered this same question with reference to the wrongful death of plaintiff's fourteen year old daughter:

“Finally, appellants complain of the amount of the verdict, which was for five thousand dollars (funeral expenses, \$606.63; damages, \$4,393.37).

“When a verdict has been challenged as excessive, the only inquiry which will be made in this court is whether or not it was the result of passion and prejudice. (Citing cases) There is no affirmative showing of passion and prejudice on the part of the jury, and it can not, under the circumstances, be inferred from the amount of the verdict.”

On this same subject the court stated in *Sasse v. Hale Morton Taxi & Auto Co.*, 139 Wash. 359, 246 P. 940, as follows:

“A further contention made by the appellants is that the verdict is excessive. It is in the sum of \$3,833.50, in addition to \$575 costs and expenses of physicians, hospital and burial. Appellants rely on *Tecker v. Seattle, Renton & S. R. Co.*, 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912B 842, and *Blair v. Kilbourne*, 121 Wash. 93, 207 Pac. 953. In the first case, decided in 1910, a verdict for \$2,500 was sustained for the wrongful death of a boy six years of age. The *Blair* case was decided in 1922. The verdict was for \$5,000, and reduced by suggestion of this court to \$2,500, for the death of a nine year old son, who was a ‘healthy child of average intelligence’. In several recent cases, including *Allison v. Bartelt*, 121 Wash. 418, 209 Pac. 863, attention has been called to the reduced purchasing power of money over what it was a few years ago. There is not, nor can there be, any fixed standard by which damages in cases of this sort can be ascer-

tained and allowed, in the absence of legislative expression.”

Also in *Vol. 14 A.L.R. 2d*, at page 550, there is an annotation on the subject of excessiveness and inadequacy of damages for personal injury resulting in death of an infant, where will be found collected numerous cases in which verdicts approximating, or in excess of the verdict in the case at bar for wrongful death were permitted to stand. So it can be seen that the Washington Court, recognizes that parents are entitled to recover substantial damages for the loss of a minor child, and that it is within the province of the jury to form an estimate of the pecuniary loss to the parent resulting from the death of the child, and that a variety of factors are involved in the proper formation of that estimate. There is in the case at bar no affirmative showing of passion or prejudice on the part of the jury and it surely cannot be inferred from the amount of the verdict. Appellee respectfully submits that Specification of Error No. XIV is without merit.

CONCLUSION

In conclusion, Appellee respectfully submits that the court should affirm the judgment of the District Court entered upon the verdict of the jury for the reason that (1) Appellant was shown to have been negligent in the maintenance of its crossing, (2) Appellant was shown to have been negligent in failing to give the required statutory warning whistles, (3) the question of contributory negligence on the part of the deceased was a question of fact for the jury and was resolved by that body adversely to Appellant, and (4) the doctrine of last clear chance as invoked in subdivisions (B) and (C) of Paragraph VII of the Complaint (Tr. 7). was properly submitted to the jury by the trial court, all in accordance with the facts and authorities heretofore reviewed.

Respectfully submitted,

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No. 14795

IN THE

United States Court of Appeals

For the Ninth Circuit

**NORTHERN PACIFIC RAILWAY
COMPANY, a corporation,**

Appellant,

vs.

ERNEST EVERETT,

Appellee.

*Appeal from the District Court of the United States
for the Eastern District of Washington,
Northern Division*

HON. SAM M. DRIVER, Judge

REPLY BRIEF OF APPELLANT

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DEC -5 1955

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REPLY BRIEF OF APPELLANT

APPELLEE'S AUTHORITIES

Appellant discusses the authorities cited in the Brief of Appellee insofar as the same bear, or fail to bear, on the three issues that were submitted for jury determination; namely:

- (a) Failure to give the statutory crossing signals;
- (b) Failure to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking;
- (c) Last clear chance.

(Appellant's Opening Brief, page 4) (Tr. 517, 518).

Appellant first discusses the cases cited from the Supreme Court of the State of Washington.

Atkins v. Churchill, 30 Wn. (2d) 859, 194 P. (2d) 364.

This case was cited in the Appellant's Opening Brief in support of its Specification of Error No. 4 and has no bearing on the three issues above referred to.

Delsman v. Bertotti, 200 Wn. 380, 93 P. (2d) 371.

This case was cited in Appellant's Opening Brief as authority for the proposition that the application of the Last Clear Chance doctrine is a question of law to be determined by the Trial Court. This case is not authority for submission to the jury of any of the three issues above outlined.

Leftridge v. Seattle, 130 Wn. 541, 228 P. 302.

This case is also cited in Appellant's Opening Brief. In that case, the Supreme Court of the State of Washington reversed a judgment and order of the Superior Court upon granting a non-suit and striking interrogatories in an action in tort. So far as the doctrine of Last Clear Chance is concerned, the Supreme Court held that the complaint stated

a cause of action under the doctrine of Last Clear Chance.

Sadler v. Northern Pacific Railway Company, 118 Wn. 121, 203 P. 10.

This case is also cited in Appellant's Opening Brief. It is unanswerable authority for the proposition that the driver of the truck was guilty of contributory negligence as a matter of law even though the statute concerning the giving of crossing signals was not fully complied with.

Sasse v. Hale Morton Taxi & Auto Co., 139 Wn. 359, 246 P. 940.

Appellant quotes syllabus (1):

"In an action for wrongful death of a child, run over by a taxicab driver, error cannot be assigned upon an instruction as to the last clear chance to avoid the accident, where there is no possible question as to the facts on which it was based."

The following quoted portion of the opinion at once establishes the factual difference from the case at bar:

The street, running northerly and southerly, was paved twenty-four feet between the curbs. At the point in question, it has considerable down grade towards the north. The child and two girl companions were walking southerly up the hill, along the sidewalk on the easterly side of

the street, bouncing a ball. The taxicab driver was going northerly down the hill. From a distance of more than two hundred feet, he observed the children approaching, bouncing the ball on the sidewalk, which is flush with the curb on that side of the street. There was no other traffic on the street. A car was parked against the right-hand curb, according to the driver's testimony about midway between him and the children, when he first saw them. The ball bounded out on the street, rolled across it to the west and down the hill towards the north, the direction the taxicab was being driven. Marjorie ran after the ball. The taxicab driver, travelling down the hill at a speed of from thirty to forty miles an hour, took the thread of the street to pass the parked auto and continued that course until, an appreciable distance beyond the parked car, estimated by some of the witnesses thirty or forty feet, he veered to the left and ran over the girl at, near, or on the curb on the west side of the street, at a point about sixty feet from where he left the thread of the street; and after striking the child, the taxicab continued on over the sidewalk down an embankment on to private property, on the west side of the west sidewalk. The speed limit for automobiles at the point in question was twenty miles an hour, under both the state law and an ordinance of the city.

“(1) The jury was instructed in effect that, if they found the child was negligent, it would not defeat the right of the father to recover, if such negligence had terminated before she was struck by the taxicab, or had culminated in a situation from which she could not avoid injury by the exercise of ordinary care without the cooperation and care on the part of the driver, and that

the driver, by keeping a vigilant lookout, could have seen her danger in time to have avoided injury by the exercise of reasonable care on his part by stopping his car, changing his course, or taking other reasonable precautions warranted by the circumstances, and that he negligently failed to keep such lookout or to exercise such care. This instruction is complained of. Whether the instruction as given is abstractly correct or not under the circumstances, it can not be said to have possibly prejudiced the rights of the appellants, in view of the fact that the taxicab driver did actually see the girl's peril prior to, and up to, the time of the injury, and in view of the further fact that there was credible disinterested testimony to the effect that the child had run clear across the street to the gutter, run along it as though she were after a ball, picked up something, stood up, screamed and was struck." (Pages 360, 361.)

Scholz v. Leuer, 7 Wn. (2d) 76, 109 P. (2d) 294.

The principal question involved in that case was whether or not the deceased girl came within the provisions of the host-guest statute of the State of Washington. None of the issues above stated were involved in that decision.

Scott v. Pacific Power & Light Company, 178 Wn. 647, 35 P. (2d) 749.

There is not the slightest factual similarity between the cited case and the case at bar. We quote syllabus (1), page 647:

“(1) ELECTRICITY (5) — INJURIES INCIDENT TO PRODUCTION OR USE — DEFECTS, ACTS, OR OMISSIONS CAUSING INJURY — EVIDENCE — SUFFICIENCY. An electric company maintaining a high voltage wire in proximity to the side or roof of a building, where persons in the pursuit of business are liable to come in contact with it, must exercise the highest degree of care to avoid injury; and a company’s negligence is a question for the jury were it maintained an uninsulated high tension wire carrying sixty-six hundred volts, within ten to twenty inches from the side of the building and extending twenty-four to thirty inches higher than the edge of the coping on the roof, which supported iron poles used for advertising purposes.”

Skeels v. Davidson, 18 Wn. (2d) 358, 139 P. (2d) 301.

Appellant assumes that this case is cited as authority for the proposition that the damages awarded to appellee were not excessive. The case was an action for malpractice. Consequently, none of the three issues above referred to were involved.

It will thus be observed that Appellee has not cited a single case from the State of Washington involving a crossing collision which justified the Trial Court in submitting to the jury the three issues above enumerated.

Appellant now discusses the cases cited by Appellee from other jurisdictions.

Bank of America National Trust & Savings Assn. v. Commissioner of Internal Revenue, 126 F. (2d) 48 (Ninth Circuit).

Western National Insurance Co. v. LeClare, 163 F. (2d) 337 (Ninth Circuit).

United States v. Gallagher, 151 F. (2d) 556 (Ninth Circuit).

These cases deal with the question involving appellate procedure and in no wise touch the three issues above referred to.

Cashatt v. Brown, 211 North Carolina 367, 190 S. E. 480.

The factual distinction between the cited case and the case at bar is shown by Syllabus 1:

“In action against railroad for death caused by train striking deceased’s automobile, evidence that deceased was riding about five miles per hour over the railroad crossing, and because of thick underbrush could not see approaching train which gave no warning of its approach, that because of lack of ballast on track deceased’s automobile stalled on the track *held* sufficient to take the question of negligence and proximate cause to the jury since the railroad must maintain the crossing in a safe condition.”

A reading that case discloses that the defective

condition of the crossing caused the vehicle to stall. There is an utter absence of evidence in the case at bar that the condition of Appellant's crossing caused the truck to stall.

Moore v. Atlantic Line Railroad Co., 201 North Carolina 26, 158 S. E. 556.

Counsel for Appellee characterizes this decision as being "a case in point." The evidence of plaintiff in that case showed that when 60 or 70 feet from the crossing, the driver of the truck stopped, looked and listened and saw no approaching train; that within seven or eight feet, he stopped, looked and listened and saw no train, though his vision up the track was one-third of a mile. The evidence for the plaintiff further disclosed that the driver and occupant of the truck were strangers to the crossing in question.

Cunningham v. Thompson, 277 S. W. (2d) 602 (Mo.).

This case involved the application of the humanitarian doctrine, which is in effect in Missouri, but never applied in the State of Washington. Appellee's counsel quotes a portion of an unfinished sentence lifted from that decision on page 610 thereof (Appellee's Brief, page 11).

“In this case defendant’s employees testified they did not see plaintiff approach the crossing. Of course, the jury was not obliged to believe the employees’ testimony . . .”

The unfinished portion of the sentence reads as follows:

“that they could not see plaintiff’s approach because of steam and smoke; and the resultant inference would be that they were not looking. Now the fact, as such, that the employees were not looking was immaterial as tending to prove any essential element of a humanitarian rule case; but Instruction No. 1 (and Instruction No. 2) is so framed as to make such fact, if inferred, a causative factor in these humanitarian submissions.”

A judgment in favor of the plaintiff based upon a verdict of the jury in the cited case was reversed by the Supreme Court of Missouri because of error in instructions involving allegations of primary negligence on the part of the defendant and also the submission of the humanitarian doctrine.

Appellee places great, if not complete, reliance upon the speed tape (defendant’s Exhibit 36) as justification for the submission of the doctrine of last clear chance. On page 7 of Appellee’s Brief is found this statement:

“When sixty miles per hour was reached, the

acceleration was arrested by a service application of the brakes, and the speed of sixty miles per hour was maintained for one-half mile. At that time, which was one-half mile, or two thousand six hundred forty feet, west of the O'Neill crossing, the service application was released, *the train accelerated to sixty-four miles per hour and maintained that speed undiminished by any type of braking—service, emergency or otherwise—*(italics supplied) to the point of impact with the truck, immediately after which the speed started dropping off to zero miles per hour, and stopped at a distance of about one-fourth of a mile from the crossing.”

There is no reference to any portion of the Transcript of Record justifying the italicized portion of Appellee's statement. It would seem to be asserted that no brake application of any kind or character was made in a distance of 2640 feet west of the crossing and not until the point of impact. If this be true, it is a clear distortion of the testimony of defendant's expert, Joseph Gaynor. He testified as follows:

“Q. Now, does that exhibit indicate anything about whether brakes were or were not applied?

(Testimony of Joseph F. N. Gaynor.)

“A. It does, it shows what they were speaking about here at some point. Well, you can take it from here (indicating), the speed is going on up here, but instead of going up and reaching 64 at a point up here—

“Q. When you say ‘a point up here,’ what are you pointing to?

“A. Well, it would reach 64 miles an hour, to reach—I will call that terminal speed, because that is the maximum speed it made—it would have reached terminal speed over here, say a quarter of a mile farther than it did if a brake application had not been made to hold that acceleration down, and it was a service application because it only changed the slope of the curve slightly. Then at this point (indicating) it shows that an emergency braking began. (515)

“Q. When you say ‘at this point,’ where is that with reference—

“A. That point is right on that crossing, on mile post 4:75, retardation begins and it stops at mile post 5, about a quarter of a mile beyond the crossing.

“Q. In other words, it began really to take hold at that point, is that what you mean?

“A. It *took hold* at the crossing, yes, sir.”

(Italics supplied.) (Tr. page 440, 441, Vol. 2.)

Again in the Transcript, the same witness testified as follows:

“Q. Have you an opinion as to what the average reaction time is of the average engineer in making an emergency stop such as was made under the conditions here existing?

“A. Yes.

Mr. Etter: I think that is all right.

“A. I have timed many of my own men.

“Q. (By Mr. McKevitt): Well, what is the average reaction time?

“A. Average time for a man to go after that brake valve, that is, just the motion of going for it, and tripping it, is just about a second, and I put a stop watch on to check them. (525.)

“Q. Then after he throws that lever into full emergency, is there anything else that could have been done on that date to stop that train?

“A. Not a thing.

“Q. Now, what other element or lag is there?

“A. There is a lag known as the braking lag, equipment lag.

“Q. Explain that to the Court and jury.

“A. Equipment lag, the brake system is a series of charged-up cylinders charged up from the train line or brake pipe, and in making an emergency application, the air that is in this brake pipe has to be gotten rid of first, and as it does, then the triple valves on the cars or control valves move to let the stored air under each car as auxiliary reservation go into the brake cylinder and push it out against the wheel.

“Q. And in order to get full braking application, do you have to get it on every wheel on the engine and on every car?

“A. That's right.

“Q. And on the number of wheels shown on these diagrams that are in here, isn't that true? Your answer is yes?

“A. Yes.

“Q. What is that time element?

“A. That time element by actual stop watch test will run (526) from three to three and a half seconds.

“Q. In other words, do I understand you to mean by that that after the full application is made and before you got full application, three to three and a half seconds elapses?

“A. Yes, sir, whatever speed the train is doing, it will proceed for about three to three and a half seconds before braking becomes effective.” (Tr. 449, 450, 451.)

We now quote from page 12 of Appellee's Brief:

“In the case at hand the jury was in no way obligated to believe all that to which Scobee (Engineer) testified. They could well have believed that he did see the approach of the truck and did make a service application of the brakes, as he so testified. They could likewise have believed that he was mistaken in his estimate of his position when he saw the girl and made the application.

“They could have rejected his testimony that he was at that moment nine hundred to one thou-

sand feet away from the crossing and *accepted the testimony of the speed tape which placed him at that moment, a mile away from the crossing.* (Italics supplied.) The jury may have believed Scobee when he said he watched the truck and when it paused or stopped at the crossing he released the service application of the brake, and, by the same token believed the speed tape when it placed the train two thousand six hundred forty feet away from the crossing at the instant the service application of braking was released. If such were the facts accepted by the jury, it it would make no real difference whether the girl saw the train, couldn't see the train or was oblivious to the train (possibilities which the death of the girl bars us now from ever knowing), since in any event she would have had ample time to get across the track had she not stalled thereon. It seems apparent that reasonable minds could find a total lack of contributory negligence in the act of attempting to drive a panel truck across a railroad track with a train approaching one-half mile away."

Appellee does not attempt to place the position of the truck when the train was one mile from the crossing. Is it to be inferred that the truck was stalled on the crossing with the train five thousand two hundred eighty feet distant therefrom? If this be so, then she must have remained in the truck for nearly a full minute before she attempted to escape therefrom. As pointed out in Appellant's Opening Brief, the engineer testified under examination by Appellee's

counsel that when he first saw the truck it was twenty-five feet from the crossing (Tr. 253). While counsel has drawn certain conclusions from the speed tape, they have not attempted to estimate the time this girl remained in the truck after it had stalled upon the crossing and with an approaching train in plain view. How long was this truck stalled on the track under Appellee's theory — sixty seconds? Fifty? Forty? Thirty? Perhaps counsel will enlighten the Court on these questions in oral argument. If she remained in that truck in an attempt to get it off the crossing for any of the periods of time above referred to, then the doctrine of last clear chance could have no application. Support for this proposition is found in one of the cases cited in Appellee's Brief *Moore v. Atlantic Coast Line Railroad Co.* (supra). At page 558, paragraphs 10 and 11 of that decision, is found this language:

“If he and his father closed their eyes to existing conditions, as if hoodwinked or blinded, and negligently awaited results, the recovery of damages should be denied, because in that event their negligence, concurring with that of defendant to the last moment, would eliminate the doctrine of defendant's last clear chance.”

This is but another way of saying that where plaintiff and defendant have an equal opportunity of

avoiding a collision, the doctrine of last clear chance does not apply. Citation of authority for such an obvious proposition is hardly necessary. Of course, the assumption, if such it be, that the truck was stalled on the crossing for any of the periods of time above mentioned, or for any period of time in excess of that testified to by the engineer and the fireman, is in no wise supported by direct testimony, nor are there any facts in the record from which the legitimate inference can be drawn that it was stalled on the crossing for any period of time in excess of that testified to by the engineer and fireman. Appellant again re-emphasizes the undeniable fact pointed out in its Opening Brief that the only eye witnesses to the approach of this truck to the crossing and the conduct of its driver were the engineer and the fireman.

CONCLUSION

In conclusion, Appellant respectfully submits that the judgment of the District Court entered upon the verdict of the jury should be reversed and the action dismissed. This, for the following reasons:

(1) There is no evidence of a substantial character or probative value that the condition of the crossing was a proximate cause of the accident.

(2) There is no evidence of a substantial character or probative value that the failure to give the full statutory crossing whistle was a proximate cause of the accident.

(3) The doctrine of last clear chance is not applicable for the reason that the evidence failed to disclose that the driver of the truck was in a position of inescapable peril or that she was oblivious to it. (*Deere v. Southern Pacific Co.*, 123 Fed. (2d) 438) (Ninth Circuit). (Appellant's Opening Brief, page 57.)

Respectfully submitted,

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No. 14796

**United States
Court of Appeals**
for the Ninth Circuit

H. S. ANDERSON, JR.,	Appellant,
vs.	
UNITED STATES OF AMERICA,	Appellee.
ETHEL H. ANDERSON,	Appellant,
vs.	
UNITED STATES OF AMERICA,	Appellee.
ROBERT W. ANDERSON,	Appellant,
vs.	
UNITED STATES OF AMERICA,	Appellee.
GLORIA S. ANDERSON,	Appellant,
vs.	
UNITED STATES OF AMERICA,	Appellee.
JOHN HARDY ANDERSON,	Appellant,
vs.	
UNITED STATES OF AMERICA,	Appellee.

Transcript of Record

**Appeals from the United States District Court for the
Southern District of California,
Central Division.**

FILED

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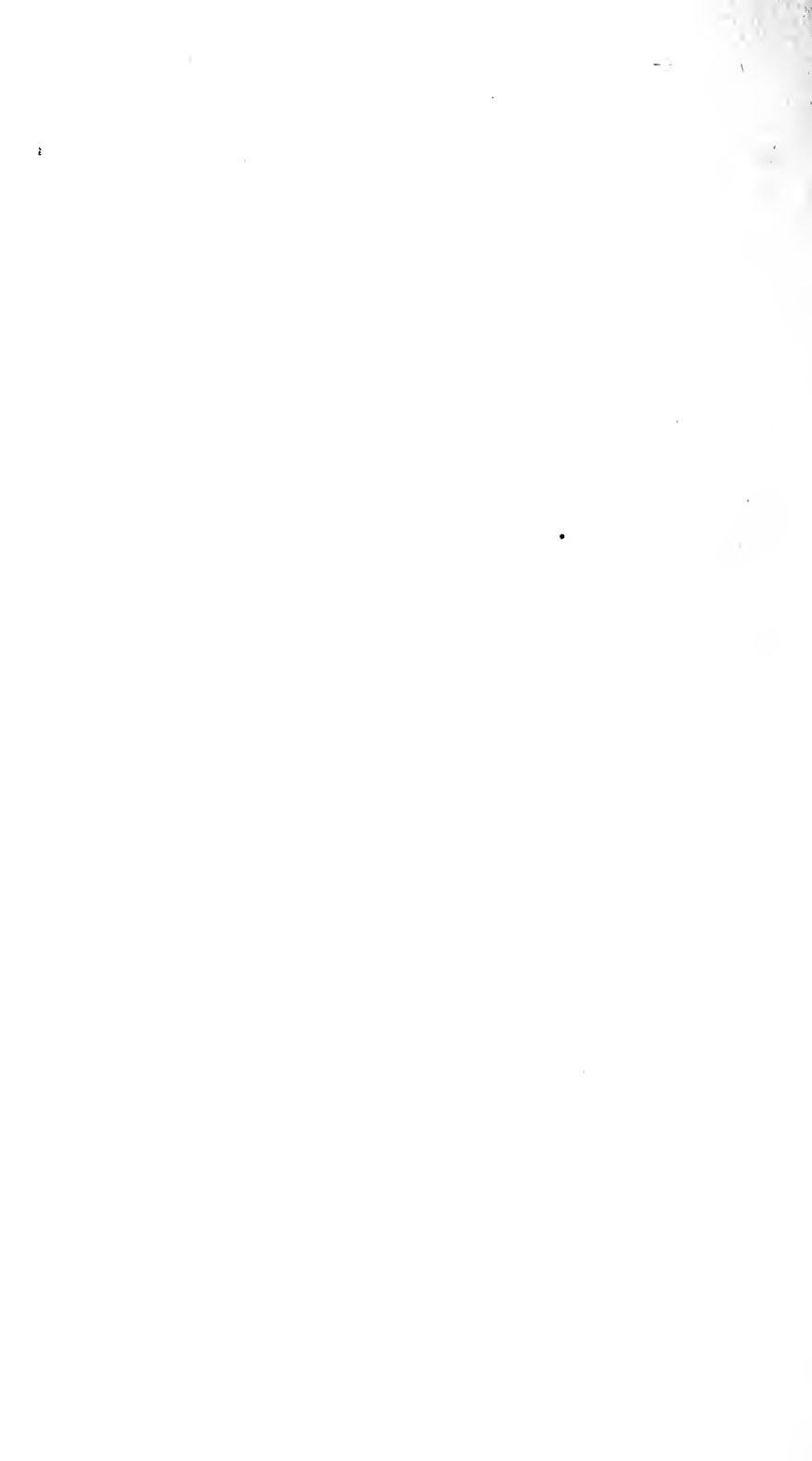
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Southern District of
California, Central Division

Civil Action No. 12044-HW

H. S. ANDERSON, JR.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF FEDERAL
INCOME TAX AND INTEREST FOR THE
CALENDAR YEAR 1943 AND/OR FOR
THE CALENDAR YEAR 1944

Plaintiff complains of the Defendant and for
cause of action alleges:

I.

This action arises under the Internal Revenue
Laws of the United States and Particularly Section
23 of the Internal Revenue Code.

II.

The plaintiff is an individual residing at 737
Sarbonne Road, Bel-Air, Los Angeles 24, Califor-
nia, which is within the Sixth Collection District,
State of California, and within the Southern Judi-
cial District of California, Central Division.

III.

The defendant is a corporation sovereign and
body politic. The taxes and interest for the recovery

of which this action is brought were paid to and collected by Harry C. Westover, who was, at the time of such payment and collection, the duly appointed, qualified and acting Collector of Internal Revenue in and for said Sixth Collection District of the State of California. Said Harry C. Westover is not in office as Collector of Internal Revenue at the time this action is commenced.

IV.

No action upon the claims herein referred to, other than as herein set forth, has been taken before the Congress or any of the departments of the United States or in any court; no assignment or transfer of said claims has been made; the plaintiff is entitled to the amount herein claimed from the defendant; and there is no just credit or off-set against said claims which is known to the plaintiff.

V.

Harold S. Anderson, Sr., died on December 27, 1941. Prior to and on the date of his death he was a member of a co-partnership consisting of himself and his son, H. S. Anderson, Jr., in which Harold S. Anderson, Sr., the decedent, owned a 75% interest and H. S. Anderson, Jr., owned a 25% interest. The business of said co-partnership consisted of subsistence contracting work (feeding and housing defense workers) and was conducted in the States of California and Nevada under the name of "H. S. Anderson." Prior to and on the date of his death said Harold S. Anderson, Sr., the decedent, was

also a member of a co-partnership consisting of himself and the Anderson sons, in which Harold S. Anderson, Sr., owned a 40% interest, Robert W. Anderson owned a 30% interest, John Hardy Anderson owned a 20% interest, and H. S. Anderson, Jr., owned a 10% interest. This co-partnership was engaged in similar activities within the territory of Alaska under the name of "Anderson Brothers Supply Company of Alaska." Controversies developed between some of the heirs of said Harold S. Anderson, Sr., and the surviving member and members of the co-partnerships heretofore referred to, which resulted in the execution of a settlement agreement dated December 11, 1942, which was approved by the Probate Court of the County of Los Angeles.

VI.

Under the terms of said settlement agreement, H. S. Anderson, Jr., as the surviving partner of the partnership known as "H. S. Anderson," agreed to pay into the Estate of H. S. Anderson, Sr., deceased, the sum of \$75,000.00, representing the agreed fair market value at date of death of the decedent of his interest in said partnership, and to pay into the Estate further sums aggregating \$60,565.80 as set forth therein. Under the terms of said settlement agreement H. S. Anderson, Jr., Robert W. Anderson and John Hardy Anderson, as the surviving partners of the partnership known as "Anderson Brothers Supply Company of Alaska," agreed to pay into the Estate of H. S. Anderson, Sr., deceased, the sum of \$50,000.00, representing

the agreed fair market value at date of death of the decedent of his interest in said Alaska partnership.

VII.

On December 23, 1942, two limited partnerships were formed. One of them, known as "H. S. Anderson Co.," was comprised of H. S. Anderson, Jr., Robert W. Anderson, and John Hardy Anderson as general partners, and Ethel Hamilton Anderson and Gloria S. Anderson as limited partners. Ethel Hamilton Anderson contributed \$7,500.00 to the limited partnership and became the owner of a 7.5% interest therein. Gloria S. Anderson contributed \$3,750.00 and became the owner of a 3.75% interest. H. S. Anderson, Jr., acquired a 42.5% interest in the limited partnership, John Hardy Anderson a 25% interest, and Robert W. Anderson a 21.5% interest therein. In an agreement dated the same date, December 23, 1942, coincidentally with the execution of the foregoing certificate of limited partnership, the three general partners and the two limited partners agreed, among other things, that said limited partnership should carry on the business of the former partnership known as "H. S. Anderson," and assume all of the contracts, debts and obligations of said former partnership. The second limited partnership created on December 23, 1942, was known as "Anderson Brothers Supply Company of Alaska." Said limited partnership was composed of H. S. Anderson, Jr., with a 25% interest therein, John Hardy Anderson, with a 33 $\frac{1}{3}$ % interest therein, and Robert W. Anderson, with a

30% interest therein, as the three general partners; and Ethel Hamilton Anderson, who contributed \$10,417.00 to the partnership and acquired an 81⅓% interest therein, and Gloria S. Anderson, who contributed \$4,167.00 and acquired a 31⅓% interest therein, as the limited partners. In an agreement executed the same date, December 23, 1942, coincidentally with the formation of said limited partnership, the general and limited partners agreed, among other things, that said limited partnership should carry on the business of the former partnership known as "Anderson Brothers Supply Company of Alaska," and assume all of the contracts, debts and obligations of said former partnership.

VIII.

Pursuant to the terms of the settlement agreement and said agreements executed on December 23, 1942, the limited partnership of "H. S. Anderson Co.," did pay into the Estate of H. S. Anderson, Sr., deceased, the total amount of \$135,565.80, of which \$58,082.52 was paid prior to the close of the calendar year 1942, and the balance of \$77,483.28 was paid during the calendar year 1943; and the limited partnership of "Anderson Brothers Supply Company of Alaska" paid into the Estate of H. S. Anderson, Sr., deceased, the sum of \$50,000.00, of which \$25,000.00 was paid prior to the close of the calendar year 1942 and the balance of \$25,000.00 was paid during the calendar year 1943. The amounts thus paid into the Estate by said limited partnerships were deducted on the

fiduciary returns filed by the respective partnerships for the years 1942 and 1943; and the individual income tax returns of the partners for the years 1942 and 1943 reflected their respective proportionate shares of said deductions.

IX.

The Commissioner of Internal Revenue determined that said payments were not deductible by the partnerships or by the respective individual partners thereof; and by virtue of said determination the partners paid to the Collector of Internal Revenue at Los Angeles, California, deficiencies in income tax for the year 1943, with interest thereon, as follows and on the following dates:

Partners	Deficiency Paid	Interest Paid	Date of Payment
H. S. Anderson, Jr.	\$18,131.61	\$3,179.40	March 19, 1947
Ethel H. Anderson	17,324.13	4,037.00	March 19, 1947
Robert W. Anderson ..	11,780.51	2,016.24	February 27, 1947
Gloria S. Anderson	9,801.01	1,677.44	February 27, 1947
John H. Anderson	30,733.04	5,259.98	February 26, 1947

X.

On December 28, 1948, each partner filed with said Collector of Internal Revenue a claim for refund of the deficiency paid by him or her in the respective amounts set forth above. A true and correct copy of said claim for refund filed by the plaintiff herein is attached hereto as "Exhibit A" and made a part of this complaint. By letter dated August 29, 1949, a true and complete copy of which is attached hereto as "Exhibit B" and made a part

hereof, the Commissioner of Internal Revenue advised the plaintiff by registered mail of the disallowance in full of said claim for refund.

XI.

On March 15, 1948, each partner filed with said Collector of Internal Revenue a claim for refund of the total income tax paid by him or her for the calendar year 1944, upon the ground that if the payments made by the said limited partnerships during the years 1942 and 1943, as heretofore in Paragraph VIII alleged, were not properly deductible for those years, they were in any event deductible by the limited partnerships and the partners thereof in 1944, when said limited partnerships were terminated and dissolved. Each of said limited partnerships was terminated and dissolved as of the close of business on December 31, 1943, by mutual consent and agreement of all the partners thereof, which was evidenced by their execution, in respect of each partnership, of a "Cancellation of Certificate of Limited Partnerships," dated June 30, 1944, and duly recorded. Income taxes paid on or before their due dates by the respective partners for the year 1944 were as follows:

Partners	1944 Income Taxes Paid
H. S. Anderson, Jr.	\$3,920.20
Ethel H. Anderson	5,014.65
Robert W. Anderson	1,416.77
Gloria S. Anderson	2,039.92
John Hardy Anderson	4,184.41

These were the respective amounts of refunds claimed on the claims for refund filed on March 15, 1948, as aforesaid. Said claims also alleged that if the payments were deductible in 1944 not only would refunds in the above amounts be due, but each partner would be entitled to a carry-back loss, which would entitle him or her, in addition, to a refund of a portion of the deficiency paid for the year 1943, as hereinabove alleged. A true and correct copy of said claim for refund for the year 1944 filed by the plaintiff herein is attached hereto as "Exhibit C" and made a part of this complaint. By letter dated May 19, 1949, a true and complete copy of which is attached hereto as "Exhibit D" and made a part hereof, the Commissioner of Internal Revenue advised the plaintiff by registered mail of the disallowance in full of said claim for refund for the year 1944.

XII.

On the date of death of Harold S. Anderson, Sr., December 27, 1941, his interests in the physical assets of the two former partnerships known as "H. S. Anderson" and "Anderson Brothers Supply Company of Alaska" had an aggregate value not in excess of \$20,291.32, as shown by the following combined balance sheets of said partnerships as at December 31, 1941:

H. S. Anderson
and
Anderson Supply Company of Alaska
As at December 31, 1941

	Anderson Supply H. S. Anderson Co. of Alaska		
	75% Interest	40% Interest	Total
Assets:			
Cash in Banks	None	None	
Cash Funds	\$ 3,420.05	\$ 2,130.00	\$ 5,550.05
Receivables	45,664.93	20,851.11	66,516.04
Inventories	51,187.82	29,482.71	80,670.53
Equipment & Warehouse			
After Depreciation	16,430.87	45,886.58	62,317.45
Deferred Charges	862.55	1,743.75	2,606.30
Sundry Stocks at Cost—			
Of Doubtful Value	14,500.00	3,008.00	17,508.00
	<hr/>	<hr/>	<hr/>
Total Assets	\$132,066.22	\$103,102.15	\$235,168.37
	<hr/>	<hr/>	<hr/>
Liabilities:			
Bank Overdrafts	\$ 22,252.67	\$ 5,308.50	\$ 27,561.17
Notes and Accounts			
Payable	132,972.18	360.00	133,332.18
Unredeemed Scrip	1,691.50	111.35	1,802.85
	<hr/>	<hr/>	<hr/>
Total Liabilities	\$156,916.35	\$ 5,779.85	\$162,696.20
	<hr/>	<hr/>	<hr/>
Net Worth	(\$24,850.13)	\$ 97,322.30	\$ 72,472.17
	<hr/>	<hr/>	<hr/>
Interest of H. S. Anderson,			
December	(\$18,637.60)	\$ 38,928.92	\$ 20,291.32

XIII.

The assets of substantial value for which the payments into the Estate of H. S. Anderson, Sr., deceased, were made by the two succeeding limited partnerships during the years 1942 and 1943, referred to in Paragraph VIII hereinabove, consisted of certain contracts which were being negotiated

at the time of the death of said Harold S. Anderson, Sr., the principal contract being one for the operation and maintenance of commissaries, subsistence facilities and housing accommodations for the employees of Basic Magnesium, Inc., at Roysen, Nevada, situated in the Nevada desert approximately 16 miles from Las Vegas. Other contracts were for the operation of commissaries at certain Army camps. Said contracts produced very substantial income during the years 1942 and 1943, and the payments made by the two limited partnerships into the Estate of H. S. Anderson, Sr., deceased, were made in recognition of the decedent's interest in said contracts and for the sole purpose of enabling the limited partners to receive their respective shares of the income produced as a result of said contracts. Said contracts were exhausted and the value thereof ceased to exist by the close of 1943.

XIV.

The payments made by the two limited partnerships during the years 1942 and 1943, in the amounts set forth above in Paragraph VIII, were expenses paid for the production or collection of income, or for the management, conservation or maintenance of property held for the production of income, within the meaning of Section 23(a)(2) of the Internal Revenue Code, and as such were properly deductible for purposes of the Federal income tax.

XV.

In the alternative, if said payments are properly to be capitalized, they should be amortized or depre-

ciated over the period of the useful life of the property acquired thereby, to-wit, the contracts, which had a useful life only during the years 1942 and 1943, and thus the total expenditures should be written off and allowed as deductions for income tax purposes during the years 1942 and 1943.

XVI.

In the further alternative, if said payments are properly to be capitalized and if amortization or depreciation deductions are not to be allowed, a loss deduction should be allowed for the year 1943, when the value of the contracts became exhausted, in the total amount of the 1942 and 1943 payments, upon the ground that an ordinary loss was sustained in a transaction entered into for profit.

XVII.

In the further alternative, a loss deduction in the same amount should be allowed for the year 1944, upon the cancellation and termination of said two limited partnerships, and a loss carry-back should be allowed from the year 1944.

XVIII.

As a result of all of the foregoing, the Commissioner's disallowance of the claimed deductions for 1942 and 1943 was erroneous and illegal; as a result thereof the plaintiff overpaid his Federal income tax for the year 1943 by the amount of the deficiency paid him on March 19, 1947 (to-wit, \$18,131.61 plus interest in the sum of \$3,179.40); said sum has not been refunded or credited to plaintiff; the whole

thereof, together with interest thereon as provided by law, is now due and owing to plaintiff; and the defendant has erroneously and illegally failed and refused to allow the plaintiff's claim for refund and to refund to plaintiff the said sum.

XIX.

In the alternative, the plaintiff overpaid his Federal income tax for the year 1944, by the amount of \$3,920.20 and, due to the carry-back of a loss from 1944, he also overpaid his 1943 income tax liability by the amount of \$6,177.67; said sums have not been refunded or credited to plaintiff; the whole thereof, together with interest thereon as provided by law, are now due and owing to plaintiff; and the defendant has erroneously and illegally failed and refused to allow the plaintiff's claims for refund and to refund to plaintiff the said sums.

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$21,311.01, plus interest thereon at the rate of 6 percent as provided by law, or, in the alternative, in the sums of \$3,920.20 for 1944 and \$6,177.67 for the year 1943, plus interest thereon at the rate of 6 per cent as provided by law, and for such other and further relief as the Court may deem just and proper in the premises.

Dated August 1, 1950.

MACKAY, McGREGOR, REYNOLDS & BENNION,

By /s/ A. CALDER MACKAY,
Attorneys for Plaintiff.

State of California,
County of Los Angeles—ss.

H. S. Anderson, Jr., being duly sworn, says that he is the plaintiff above-named; that he has read the said complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

/s/ H. S. ANDERSON, JR.

Subscribed and sworn to before me this 1st day of August, 1950.

[Seal] /s/ MARY E. WHITTHORNE,
Notary Public in and for the County of Los Angeles,
State of California.

My Commission Expires November 26, 1953.

EXHIBIT A

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Form 843, Treasury Department, Internal revenue
Service (Revised July 1947.)

The collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

Collector's Stamp (Date received): [Blank]

- ☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,

County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps:

H. S. Anderson, Jr.

Business address:

Residence: 737 Sarbonne Road Bel-Air, Los Angeles 24, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year): January 1, 1943 to December 31, 1943.
3. Character of assessment or tax: Individual income tax and victory tax.
4. Amount of assessment, \$50,371.20; dates of payment March 19, 1947. (\$18,131.61)
5. Date stamps were purchased from the Government:

6. Amount to be refunded: \$18,131.61*
7. Amount to be abated (not applicable to income, gift, or estate taxes): \$.....
8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on March 19, 1949.

The deponent verily believes that this claim should be allowed for the following reasons:

(See Statement Attached.)

/s/ H. S. ANDERSON, JR.

Subscribed and sworn to before me this 23rd day of November, 1948.

[Seal] /s/ EDWARD BOUMA, JR.,
Notary Public.

My commission expires June 1, 1951.

I. During the years 1942 and 1943 payments were made by the following partnerships pursuant to a contract dated December 11, 1942:

Partnerships	1942	1943	Total
H. S. Anderson Co.	\$ 58,082.52	\$ 77,483.28	\$135,565.80
Anderson Brothers Supply Co. of Alaska	25,000.00	25,000.00	50,000.00
	<hr/>	<hr/>	<hr/>
	\$ 83,082.52	\$102,483.28	\$185,565.80

*Together with interest paid by the taxpayer in the sum of \$3,179.40, plus interest from the date of overpayment as provided by law.

Such payments were deducted on the fiduciary returns of said partnerships for the respective years, but were disallowed as deductions by Examining Officer Ralph N. Brown, as per his reports dated December 26, 1946, communicated to the partnerships by letters dated April 29, 1947 (LA:R), which are incorporated herein by reference.

II. Said payments were allocated among the partners of said partnerships and their wives in accordance with their respective interests, and by virtue of such disallowances, and pursuant to reports of Examining Officer Ralph N. Brown dated December 26, 1946, communicated to the taxpayers by letters dated April 29, 1947 (LA:R), which likewise are incorporated herein by reference, the members of said partnerships and their wives paid deficiencies in income tax for the calander year 1943, plus interest thereon, as follows:

Taxpayers	Deficiency	Interest	Dates of Payment
H. S. Anderson, Jr.	\$18,131.61	\$3,179.40	March 19, 1947
Ethel H. Anderson	17,324.13	4,037.00	March 19, 1947
Robert W. Anderson ..	11,780.51	2,016.24	February 27, 1947
Gloria S. Anderson	9,801.01	1,677.44	February 27, 1947
John H. Anderson	30,733.04	5,259.98	February 26, 1947

III. The theory upon which said payments were disallowed as deductions was that by them a purchase was made of the interest in said partnerships of H. S. Anderson, deceased, or his estate. The only asset of any consequence owned by each of said partnerships at the date of death of said decedent was a contract, which was exhausted and the

value of which ceased to exist by the close of 1943. Furthermore, the partnership interests allegedly thus acquired were terminated and ceased to exist as of January 1, 1944.

IV. The partners and their wives file claims for refund upon the ground that, if the Examining Officer was correct in capitalizing said payments, the amounts thus capitalized should have been amortized or depreciated over the period of the useful life of the property acquired in exchange therefor, to-wit, the period from the death of the decedent to December 31, 1943, and thus the total expenditures should be written off as deductions during the years 1942 and 1943. A proper basis and method of amortization as between the year 1942 and 1943 is the amount actually expended during each year, upon the authority of *Associated Patentees, Inc.*, 4 T.C. 979, in which the Commissioner has acquiesced, 1946-1. C.B. 1.

V. In the alternative, the amounts expended are allowable deductions as ordinary and necessary business expenses under section 23(a)(1) of the Internal Revenue Code, or as expenses for the production of collection of income or for the management, conservation, or maintenance of property held for the production of income, within the meaning of section 23(a)(2) of the Internal Revenue Code

IV. In the further alternative, a loss deduction should be allowed for the year 1943 (when the value

of the contracts became exhausted) in the total amount of the payments, upon the ground that an ordinary loss was sustained in a transaction entered into for profit.

VII. In the further alternative, a loss carry-back should be allowed from the year 1944, as per the claims for refund filed by these taxpayers for the year 1944 on March 15, 1948.

VIII. Claimant requests and demands such further or additional refund or refunds as may now or hereafter appear to be due him by reason of the foregoing or on account of (a) any mistake in fact or in law made by himself or any officer, clerk or other employee of the United States Treasury Department in the preparation, amendment and/or adjustment of his said return, (b) any mistake in the payment and/or collection of the tax made by any person designated in subdivision (a) of this paragraph, (c) any erroneous or illegal requirement or regulation of any officer, clerk or other employee of the United States Treasury Department, (d) any repealed law, whether heretofore or hereafter repealed, (e) any unconstitutional law whether heretofore or hereafter declared unconstitutional, or (f) any other act or matter in connection with the said return, whether covered by the foregoing or not so covered.

This is to certify that the undersigned prepared the foregoing claim for refund and that the state-

ment of facts therein set forth is from information furnished by the taxpayer, which the undersigned believes to be true.

/s/ HUGH G. ARNOLD,
Representative of Taxpayer,
621 S. Spring St.,
Los Angeles 14, Calif.

EXHIBIT B

Letter of U. S. Treasury Department
Washington 25

Aug. 29, 1949.

Office of
Commissioner of Internal
Revenue.

Address reply to
Commissioner of Internal
Revenue.

And refer to IT:C1:CC:Rej.

Mr. H. S. Anderson, Jr.,
737 Sarbonne Road, Bel Air,
West Los Angeles 24, California.

Dear Mr. Anderson:

In re: Claim for refund of \$18,131.61 for
the year 1943.

In accordance with the provisions of section 3772
(a)(2) of the Internal Revenue Code, this notice of

disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

E. I. McLARNEY,
Deputy Commissioner.

EXHIBIT C

Claim

To Be Filed With the Collector Where Assessment
Was Made Or Tax Paid

Form 843

Treasury Department

Internal Revenue Service

(Revised July 1947)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

Collectors Stamp (Date received) : [Blank]

- ☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,

County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps:

H. S. Anderson, Jr.,

Business address:

Residence: 737 Sarbonne Road, Bel Air, Los Angeles 24, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from: January 1, 1944, to December 31, 1944.
3. Character of assessment or tax: Individual income tax.
4. Amount of assessment, \$3,920.20; dates of payment March 15, 1945.
5. Date stamps were purchased from the Government:
6. Amount to be refunded: \$3,920.20
7. Amount to be abated (not applicable to income, gift, or estate taxes): \$.....
8. The time within this claim may be legally filed expires, under section 322(b) of Internal Revenue Code on March 15, 1948.

The deponent verily believes that this claim should be allowed for the following reasons:

(See Statement Attached.)

/s/ H. S. ANDERSON, JR.,
737 Sarbonne Rd. L. A., 24.

Subscribed and sworn to before me this 12th day of March, 1948.

[Seal] /s/ EDWARD BOUMA, JR.,
Notary Public.

My Commission Expires June 1, 1951.

I. During the years 1942 and 1943 payments were made by the following partnerships pursuant to a contract dated December 11, 1942:

Partnerships	1942	1943	Total
H. S. Anderson Co.	\$ 58,082.52	\$ 77,483.28	\$135,565.80
Anderson Brothers Supply Co. of Alaska	25,000.00	25,000.00	50,000.00
	<hr/>	<hr/>	<hr/>
	\$ 83,082.52	\$102,483.28	\$185,565.80

Such payments were deducted on the fiduciary returns of said partnerships for the respective years, but were disallowed as deductions by Examining Officer Ralph N. Brown, as per his reports dated December 26, 1946, communicated to the partnerships by letters dated April 29, 1947 (LA:R), which are incorporated herein by reference.

II. Said payments were allocated among the partners of said partnerships and their wives in accordance with their respective interests and by virtue of such disallowances, and pursuant to reports of Examining Officer Ralph N. Brown dated December 26, 1946, communicated to the taxpayers by letters dated April 29, 1947 (LA:R), which likewise are incorporated herein by reference, the members of said partnerships and their wives paid de-

ficiencies in income tax for the calendar year 1943, plus interest thereon, as follows:

Taxpayers	Deficiencies	Interest	Dates of Payment
H. S. Anderson, Jr.	\$18,131.61	\$3,179.40	March 19, 1947
Ethel H. Anderson	17,324.13	4,037.00	March 19, 1947
Robert W. Anderson ..	11,780.51	2,016.24	February 27, 1947
Gloria S. Anderson	9,801.01	1,677.44	February 27, 1947
John H. Anderson	30,733.04	5,259.98	February 26, 1947

III. The theory upon which said payments were disallowed as deductions was that by them a purchase was made of the interest in said partnerships of H. S. Anderson, deceased, or his estate. The only asset of any consequence owned by said partnerships at the date of death of said decedent was a contract, which was exhausted and the value of which ceased to exist by the close of 1943. The partners and their wives intend to file claims for refund of taxes paid for 1942 and 1943 upon the ground that they are entitled to amortize said payments over the life of said contract or deduct the same as expenses or as a loss incurred in a transaction entered into for profit.

IV. The partners and their wives, however, respectively file these claims for 1944 to protect their rights upon the ground that in any event the partnership interests acquired from the decedent were terminated and ceased to exist as of January 1, 1944, upon the termination of said partnerships, and the amounts paid therefor became at that time a total loss deductible in full from taxable income, and/or the said contract became wholly worthless during

1944. On their returns for the year 1944 the partners and their wives failed to deduct their respective proportionate shares of said loss, and they therefore make claim for refund on account thereof. The allowance of such a deduction to each partner and his wife will result in a net operating loss, which the taxpayers are entitled to carry-back to 1942.

V. Claimant requests and demands such further or additional refund or refunds as may now or hereafter appear to be due him by reason of the foregoing or on account of (a) any mistake in fact or in law made by himself or any officer, clerk or other employee of the United States Treasury Department in the preparation, amendment and/or adjustment of his said return, (b) any mistake in the payment and/or collection of the tax made by any person designated in subdivision (a) of this paragraph, (c) any erroneous or illegal requirement or regulation of any officer, clerk or other employee of the United States Treasury Department, (d) any repealed law, whether heretofore or hereafter repealed, (e) any unconstitutional law whether heretofore or hereafter declared unconstitutional, or (f) any other act or matter in connection with the said return, whether covered by the foregoing or not so covered.

This is to certify that the undersigned prepared the foregoing claim for refund and that the statement of facts therein set forth is from information

furnished by the taxpayer, which the undersigned believes to be true.

/s/ HUGH G. ARNOLD,
Representative of Taxpayer,
621 S. Spring St.,
Los Angeles 14, Calif.

EXHIBIT D

Letter of
U. S. Treasury Department
Washington 25

May 19, 1949.

Office of
Commissioner of Internal
Revenue.

Address reply to
Commissioner or Internal
Revenue.

And refer to
IT:C1:CC:Rej.

H. S. Anderson, Jr.,
737 Sarbonne Road, Bel Air,
West Los Angeles 24, California.

In re: Claim for refund of \$3,920.20 for
the year 1944.

Dear Mr. Anderson:

In accordance with the provisions of section 3772
(a)(2) of the Internal Revenue Code, this notice of

disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner.

Very truly yours,

E. I. Mc LARNEY,
Deputy Commissioner.

[Endorsed]: Filed August 4, 1950.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above-entitled action and in answer to plaintiff's complaint admits, denies, and alleges:

I.

Admits the allegations contained in Paragraphs I, II and III.

II.

Denies the allegations contained in paragraph IV of the complaint, except that defendant admits that no action upon the claims therein referred to, other than as set forth in the complaint, has been taken before the Congress or any of the Departments of the United States or in any court; and that no assignment or transfer of said claims has been made.

III.

Admits the allegations contained in paragraphs V and VI of the complaint, except that defendant denies that H. S. Anderson agreed to pay into the estate of H. S. Anderson, Sr., deceased, further

sums aggregating \$60,565.80 as alleged in paragraph VI of the complaint.

IV.

For answer to the allegations contained in paragraph VII of the complaint, defendant avers that it is without sufficient information to form a belief as to the truth and accuracy of the allegations therein contained and therefore denies them.

V.

Denies the allegations contained in paragraph VIII of the complaint, except that defendant admits that the amounts therein mentioned as having been paid into the estate by said limited partnerships were deducted on the fiduciary returns filed by the respective partnerships for the years 1942 and 1943.

VI.

Admits the allegations contained in paragraph IX of the complaint, except that defendant denies that H. S. Anderson, Jr., paid interest of \$3,179.40 on the deficiency of income tax for 1943 in the amount of \$18,131.61, and that the deficiency in tax and interest thereon was paid on March 19, 1947, as alleged; and also denies that Ethel H. Anderson paid interest in the amount of \$4,037.00 on the deficiency of 1943 income tax in the amount of \$17,-324.13 and paid that deficiency and interest thereon on March 19, 1947, as alleged. Further answering the allegations contained in paragraph IX of the complaint, defendant avers that upon information and belief H. S. Anderson, Jr., paid interest on the

aforesaid deficiency of \$18,131.61 in the amount of \$3,103.24, and that payments on account of said deficiency and interest were made by H. S. Anderson, Jr., in the amounts and on the dates as follows: \$5,000.00 on February 26, 1947; \$15,332.59 on March 19, 1947; \$902.32 on March 25, 1947; and \$.06 by transfer to a January account; and that Ethel H. Anderson paid interest in the amount of \$2,965.04 on the aforesaid deficiency of \$17,324.13, and made payments on account of said deficiency and interest in the amounts and on the dates as follows: \$5,000.00 on February 26, 1947, and \$15,289.17 on that same date.

VII.

Admits the allegations contained in paragraph X of the complaint, but defendant denies each and every allegation of fact contained in the claim for refund, Exhibit A, referred to therein, not hereinbefore or hereinafter specifically admitted.

VIII.

For lack of sufficient information to form a belief as to the truth or accuracy of the allegations therein contained, defendant denies the allegations contained in paragraph XI of the complaint, except that defendant admits that each partner on March 15, 1948, filed a claim for refund of income tax paid by him or her for the calendar year 1944, and that Exhibit C, referred to in said paragraph of the complaint, is a true copy of the claim for refund filed by plaintiff, and that exhibit D is a true copy of the notice of rejection of said refund claim, but

defendant denies each and every allegation of fact contained in said refund claim not hereinbefore and hereinafter specifically admitted.

IX.

Denies each and every allegation contained in paragraphs XII, XIII, XIV, XV, XVI, XVII, XVIII and XIX.

X.

Denies each and every allegation contained in the complaint not hereinbefore specifically admitted.

Wherefore, the defendant prays judgment against the plaintiff, dismissing the plaintiff's complaint with costs and disbursements expended by this defendant.

ERNEST A. TOLIN,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistants United States
Attorney;

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of
Internal Revenue;

/s/ E. H. MITCHELL,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 10, 1951.

[Title of District Court and Cause.]

INTERROGATORIES BY DEFENDANT

(Pursuant to Fed. R. Civ. P. Rule 33)

To: H. S. Anderson, Jr., Plaintiff:

The defendant, pursuant to Federal Rules Civil Procedure Rule 33, directs you to answer separately and fully in writing and under oath the following interrogatories within 15 days from the time these interrogatories are served upon you:

1. Did you and your father, Harold S. Anderson, Sr., ever enter into a written agreement of partnership for the carrying on of subsistence contracting work in the States of California or Nevada?

2. Were there ever any written letters or memoranda between you and your father regarding the conduct, terms, sharing of profits of a subsistence contracting business in the States of California or Nevada?

3. Are there any written letters or memoranda of agreement between you and your father now in existence for the carrying on of a partnership for subsistence contracting work in the States of California or Nevada?

4. Did you and your father have an oral partnership agreement for the purpose of carrying on subsistence contracting business in the States of California or Nevada?

5. If you had such an oral contract, as referred to in question 4 hereinabove, state when it was en-

tered into, who was present, and the place where made.

6. State the terms of said oral agreement, if any, and in particular, the following:

(a) The capital contributions of each partner to be made.

(b) The respective duties of each partner.

(c) The agreement as to sharing of profits between partners.

(d) The agreed duration of the partnership.

(e) The agreement as to division of partnership assets on dissolution, if any.

(f) Whether there were any provisions of the oral agreement as to the disposition of the partnership assets upon the termination of the partnership whether by death or other reasons.

(g) State any agreements between you and your father as to the interest of the estate of any partner in the earnings of the partnership.

7. Did the copartnership H. S. Anderson also known as H. S. Anderson Co., between yourself and your father file a certificate of fictitious firm name in the State of California?

8. Did the copartnership H. S. Anderson also known as H. S. Anderson Co., between yourself and your father file a certificate of fictitious firm name in the State of Nevada?

9. Did said copartnership between yourself and your father enter into written contracts for the carrying on of subsistence contracting work during the years 1938, 1939, 1940 or 1941?

10. If it did enter into any written contracts, as

asked under the previous question, state the names and addresses of the companies or corporations with whom the copartnership entered into contracts.

11. Did said copartnership between yourself and your father enter into oral contracts with any companies, corporations or individual proprietorships during the years 1938, 1939, 1940 or 1941 for the carrying on of subsistence contracting business in the States of California or Nevada?

12. If your answer to the previous question is "yes," state the names of the companies, corporations or individual proprietorships with which such oral contracts were made.

13. Did John Hardy Anderson contribute any money, real property, securities, or any other personal property to the partnership formed September 23, 1942, known as H. S. Anderson Co.?

14. Did Robert W. Anderson contribute any money, real property, securities, or any other personal property to the partnership formed September 23, 1942, known as H. S. Anderson Co.?

15. If the answer to either questions 13 or 14 is "yes," state the details of the contributions to the partnership by each partner.

16. Who was the attorney, or who were the attorneys, of the administrator of the Estate of H. S. Anderson, Deceased?

17. Which attorney, or attorneys, represented you, as alleged surviving partner of the partnership known as H. S. Anderson Co., in arriving at the settlement agreement alleged in paragraph VI of the complaint?

18. With which persons did you ever negotiate subsistence contracting agreements in the States of California and Nevada prior to the death of your father?

19. With which persons did you ever negotiate subsistence contracting agreements in the State of California and Nevada after the death of your father to December 23, 1942?

20. With respect to the persons, if any, you have named in your answers to questions 17, 18 and 19, state their respective names and addresses and that of their employers.

21. Were any balance sheets of H. S. Anderson, also known as H. S. Anderson Co., as of December 27, 1941, ever prepared by your accountants, by accountants for the firm of H. S. Anderson Co., or by accountants for the Estate of H. S. Anderson?

22. Were any balance sheets of H. S. Anderson, also known as H. S. Anderson Co., as of December 31, 1941, ever prepared by your accountants, by accountants for the firm of H. S. Anderson Co., or by accountants for the Estate of H. S. Anderson?

23. Were any balance sheets of H. S. Anderson, also known as H. S. Anderson Co., as of December 21, 1942, ever prepared by your accountants, by accountants for the firm of H. S. Anderson Co., or by accountants for the Estate of H. S. Anderson?

24. Were any balance sheets of H. S. Anderson, also known as H. S. Anderson Co., as of December 31, 1942, ever prepared by your accountants, by accountants for the firm of H. S. Anderson Co., or by accountants for the Estate of H. S. Anderson?

25. Were any balance sheets of Anderson Bros. Supply Co. of Alaska, as of December 27, 1941, ever prepared by your accountants, by accountants for the firm of H. S. Anderson Co., or by accountants for the Estate of H. S. Anderson?

26. Were any balance sheets of Anderson Bros. Supply Co. of Alaska, as of December 31, 1941, ever prepared by your accountants, by accountants for the firm of H. S. Anderson Co., or by accountants for the Estate of H. S. Anderson?

27. Were any balance sheets of Anderson Bros. Supply Co. of Alaska, as of December 21, 1942, ever prepared by your accountants, by accountants for the firm of H. S. Anderson Co., or by accountants for the Estate of H. S. Anderson?

28. Were any balance sheets of Anderson Bros. Supply Co. of Alaska, as of December 31, 1942, ever prepared by your accountants, by accountants for the firm of H. S. Anderson Co., or by accountants for the Estate of H. S. Anderson?

29. If your answer to any of the questions, 21 through 28, was "yes," state in each instance by whom the balance sheets were prepared.

30. If your answer to any of the questions, 21 through 28, was "yes," state for whom each balance sheet was prepared.

31. When, and from whom, did H. S. Anderson, Sr., acquire Lots 65 and 66 in the Industrial Center Tract in the County of Los Angeles, State of California, as per map recorded in Book 12, Page 101 of maps, in the office of the County Recorder of said county?

32. What consideration was paid for said Lots 65 and 66?

33. How many shares of Douglas Oil and Refining Corp. stock stood in the name of H. S. Anderson at the date of his death?

34. When, and from whom, did H. S. Anderson, Sr., acquire said shares of Douglas Oil and Refining Corp. stock?

35. What consideration was paid for the said shares of Douglas Oil and Refining Corp. stock?

36. What is the legal description of a certain oil lease in Ventura County referred to in paragraph 22 of the Agreement dated December 11, 1942?

37. When, and from whom, was said oil lease, described in paragraph 22 of said Agreement of December 11, 1942, acquired?

38. What consideration was paid for said oil lease in Ventura County?

39. How many shares of Puett Starting Gate Co. stock were held by H. S. Anderson at the date of his death?

40. When, and from whom, were the said shares of Puett Starting Gate Co. Stock acquired?

41. What consideration was paid for the said shares of Puett Starting Gate Co. stock?

42. Were there separate books and records kept for the Anderson Bros. Supply Co. of Nevada apart from the H. S. Anderson Co. books and records?

43. Did you, as surviving partner of H. S. Anderson Co., contribute any assets of that business to the new limited partnership of H. S. Anderson Co., formed December 23, 1942?

44. If your answer to question 43 is "yes," list all the assets you contributed and their book value as shown on the books of the new limited partnership.

45. Were any written agreements of dissolution of the limited partnership of H. S. Anderson Co. entered into besides that cancellation of certificate dated June 30, 1944?

46. If your answer to question 45 is "yes," set forth the titles of the various agreements or memoranda entered into, the dates of execution and the parties who executed said agreements and memoranda.

47. Did the partners in the partnership known as Anderson Bros. Supply Co. of Nevada ever enter into a written Articles of Partnership?

48. When was the partnership known as the "Anderson Bros. Supply Co. of Nevada" formed?

49. When did the partnership known as the "Anderson Bros. Supply Co. of Nevada" commence doing business?

50. Did the partnership known as the Anderson Bros. Supply Co. of Nevada ever cease doing business?

51. If your answer to question 50 is "yes," when did it cease doing business?

52. Was the partnership referred to as Anderson Bros. Supply Co. of Nevada ever dissolved?

53. If your answer to question 52 is "yes," when was it dissolved?

54. Did the partners in the partnership known as Anderson Bros. Supply Co. of Nevada ever enter into a written Articles of Dissolution?

55. State in detail what taxes covering what property are represented by the deduction of \$4,203.63 shown under the item, "Property, personal and real estate" in "Taxes, Schedule C" of the partnership return of income for H. S. Anderson Co. for the year 1944.

56. Did you, as a partner in the firm of Anderson Bros. Supply Co. of Nevada, file, or cause to be filed, with the Collector of Internal Revenue in either California or Nevada one or more United States Partnership Returns of income, Form 1065, for any part of the years 1941, 1942, 1943 or 1944?

57. If your answer to question 56 was "yes," with whom were they filed and for what periods?

58. Were you the only administrator of the Estate of H. S. Anderson, deceased, Los Angeles Superior Court No. 210180?

59. What is the address of the McNeill Construction Co.?

60. With whom, if anyone, in the McNeill Construction Co. did you negotiate subsistence contracts?

61. What disposition did you make of Lots 65 and 66 in the Industrial Center Tract in the County of Los Angeles, State of California, as per map recorded in Book 12, page 101 of Maps, in the office of the County Recorder of said County? (Give details, to whom sold, or conveyed, price, date, recordation of deeds.)

62. What disposition did you make of the shares of Douglas Oil and Refining Corp. stock which stood in the name of H. S. Anderson at the date of

his death? (Give details, to whom sold or given, amounts realized, dates of disposition.)

63. What disposition did you make of the shares of Puett Starting Gate Co. stock held by H. S. Anderson at the date of his death? (Give details, to whom sold or given, amounts realized, dates of disposition.)

64. What disposition did you make of the oil lease in Ventura County which stood in the name of H. S. Anderson at the date of his death? (Give details, dates of conveyance, to whom granted, assigned, etc., recordation data, amounts realized, dates of transactions.)

65. In whose custody are the books and records of the Anderson Bros. Supply Co., of Nevada?

66. In whose custody are the books and records of the copartnership known as H. S. Anderson, also known as H. S. Anderson Co.?

67. In whose custody are the books and records of the limited partnership known as the H. S. Anderson Co. covering the period December 23, 1942 to June 30, 1944?

68. In whose custody are the books and records of the Anderson Bros. Supply Co. of Alaska?

69. In whose custody are the books and records of the partnerships which succeeded those limited partnerships known as H. S. Anderson Co. and Anderson Bros. Supply Co. of Alaska?

70. What are the names of the Copartnerships which succeeded the limited partnerships known as the Anderson Bros. Supply Co. of Alaska and H. S. Anderson Co.?

71. Who were the partners in the partnership known as "Anderson Bros. Supply Co. of Nevada"?

72. What capital contributions did the partners in Anderson Bros. Supply Co. of Nevada make to that partnership?

73. What share of the earnings was each of the partners in Anderson Bros. Supply Co. of Nevada entitled to?

74. Was there an agreement among the partners in Anderson Bros. Supply Co. of Nevada as to the rights of the various partners in the assets of that partnership upon the dissolution of that partnership?

Dated: This 13th day of December, 1951.

WALTER S. BINNS,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistants United States
Attorney;

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of
Internal Revenue;

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 13, 1951.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES

Answer of plaintiff, H. S. Anderson, Jr., to interrogatories served on him by defendant on December 14, 1951:

1. No.

2. To the best of my knowledge and belief there were no such written letters or memoranda. However, the financial statements of the partnership, the partnership returns filed and accepted, and the agreement dated December 11, 1942, establish the existence of the partnership.

3. Same answer as No. 2.

4. Yes.

5. Said oral partnership agreement was entered into approximately January 1938, at 737 Sarbonne Road, Los Angeles 24, California, and there were present H. S. Anderson, Sr., H. S. Anderson Jr., Robert W. Anderson and John H. Anderson.

6.(a) My father was to contribute the assets then invested in the business. I was to contribute services.

(b) The duties of each partner were similar. I was the chief accountant for the business and also spent more time in the field as Field Supervisor than did my father.

(c) The profits were to be shared 75% to my father and 25% to me.

(d) It was understood that the partnership would be permanent.

(e) It was understood that the division of assets would be according to our interests in the profits.

(f) There was no agreement specifically regarding sale or other disposition of assets.

(g) There was no agreement with respect to the interest of an estate in the partnership.

7. To the best of my knowledge it did not.

8. To the best of my knowledge it did not.

9. Yes.

10. McDonald and Kahn, General Contractors, Financial Center Building, San Francisco, California; San Francisco Women's Clubhouse Association; San Francisco, California (for work at the San Francisco Fair, under the name of Van Catering); California Shipbuilding Corporation, Terminal Island, California; Camp San Luis Obispo Post Exchange, San Luis Obispo, California; Camp Roberts Post Exchange, Camp Roberts, California; Basic Magnesium, Inc. (Defense Plant Corporation), Las Vegas, Nevada; Hollywood Turf Club, Inglewood, California; Senator Coffee Shop, Senator Hotel, Carson City, Nevada.

11. Yes.

12. Douglas Aircraft Co., Long Beach, California.

13. I assume the partnership referred to in this question is the one created on December 23, 1942. The answer to the question on this assumption is "yes."

14. Same answer as No. 13.

15. During 1940 John Hardy Anderson and Robert W. Anderson advanced to the California

partnership the sums of \$7,196.32 and \$10,794.48, respectively, out of their profits from the Alaska partnership. During 1941 they similarly advanced to the California partnership the sums of \$12,000.00 and \$18,000.00, respectively. After deducting repayments of \$95.25 and \$1,325.00 and income tax payments for their accounts in the sums of \$437.84 and \$531.37, they had net advances in the California partnership at December 31, 1941, in the sums of \$18,663.23 and \$26,938.11, respectively. These funds remained invested in the business of the California partnership and were credited to the capital accounts of John Hardy Anderson and Robert W. Anderson on the books of the new limited California partnership created December 23, 1942.

In addition, the business of the former California partnership in effect was conducted by me as surviving partner and the estate during the period from December 27, 1941, to December 11, 1942; and the estate's 75% share of net profits for said period was \$228,369.32, which profits were paid into the estate and distributed to the heirs before the close of 1942, as set forth in the agreement dated December 11, 1942. The sum of \$38,061.55 was thus distributed to each of John Hardy Anderson and Robert W. Anderson, representing his respective one-sixth interest as an heir in said net income; he reported said sum as income taxable to him as a distributee of the estate; and this sum was invested by each of them in the new limited California partnership created December 23, 1942.

16. Victor Ford Collins.

17. Victor Ford Collins and A. Calder Mackay.

18. Jointly with my father I negotiated for subsistence contracting agreements with various officers at Camp San Luis Obispo Post Exchange (among them, a Major Stone) and at Camp Roberts Post Exchange; and with Howard Mann, General Manager for McNeil Construction Company, at Las Vegas, Nevada (Basic Magnesium, Inc., job).

19. Howard Mann, General Manager for McNeil Construction Company; Louis Bean, Defense Plant Corporation, Las Vegas, Nevada; the plant manager of Douglas Aircraft Company, Long Beach, California; William Waste, project manager, California Shipbuilding Corporation, Terminal Island, California.

20. The information requested in this question is given in answers No. 18 and No. 19.

21. No.

22. Yes.

23. No.

24. Yes.

25. No.

26. Yes.

27. No.

28. Yes.

29. The balance sheets referred to in No. 22 and No. 24 were prepared by Hugh G. Arnold, 5410 Wilshire Boulevard, Los Angeles 36, California; and those referred to in No. 26 and No. 28 were prepared by Alfred F. Ohl.

30. Said balance sheets were prepared for the respective partnerships.

31. Said property was acquired, to the best of my knowledge, in 1937 from Pacific Provision Company.

32. To the best of my knowledge, the consideration for said property was cost through foreclosure in the sum of \$5,071.70.

33. 2,812 shares.

34. To the best of my knowledge, said shares were acquired on July 14, 1941, from George W. Stratton.

35. To the best of my knowledge, \$5,000.00, or \$1.778 per share.

36. The southeast quarter of the southwest quarter and Lot 6 of Section 14, Township 3 North, Range 23 West, San Bernardino Base and Meridian.

37. By assignment dated May 6, 1938, from Bill Davis.

38. To the best of my knowledge, \$10.00.

39. 20 shares.

40. To the best of my knowledge, said shares were acquired from the Puett Starting Gate Co. upon original issuance in 1939.

41. To the best of my knowledge, \$2,000.00.

42. The Anderson Bros. Supply Co. of Nevada was merely a branch or division of H. S. Anderson Co. A separate set of books was maintained for the Nevada job.

43. Yes.

44. I contributed my interest in the following assets, subject to the following liabilities and reserves, as shown on the books of the new limited partnership:

Cash	\$ 21,742.59
Accounts Receivable	68,308.95
Inventories	167,001.63
Deferred Charges	67,463.38
Advances to other partnerships....	79,601.39
Inter-Job Accounts	12,618.77
Equipment (net after depreciation)	228,857.38
Investments (cost)	12,071.70
<hr/>	
Total	\$657,665.79
Liabilities and Reserves	\$557,665.79

45. No.

46. Not applicable.

47. The Anderson Bros. Supply Co. of Nevada was not a separate partnership, but was merely a special trade name under which the Nevada job was conducted by H. S. Anderson Co. Hence there were no written Articles of Partnership, except those forming the California Partnership.

48. The Anderson Bros. Supply Co. of Nevada was not a separate partnership.

49. Negotiations which culminated in the business carried on under the name of Anderson Bros. Supply Co. of Nevada were commenced in 1941.

50. The Anderson Bros. Supply Co. of Nevada was not a separate partnership; but as a job of the California limited partnership created December 23, 1942, it ceased doing business when the latter partnership ceased doing business, as of December 31, 1943.

51. This question is answered in No. 50 above.

52. Anderson Bros. Supply Co. of Nevada, since it never existed as a separate partnership, was never dissolved as such.

53. It was dissolved as part of H. S. Anderson Co. in 1944, as of December 31, 1943.

54. Only as part of the dissolution of H. S. Anderson Co.

55. These taxes consisted of:

Basic Magnesium Project, Clark County Nevada, real and personal property	\$1,781.67
L. A. Warehouse, 1281 East Sixth Street, real and personal property.....	2,421.96
	<hr/>
	\$4,203.63

56. No, inasmuch as the Anderson Bros. Supply Co. of Nevada was not a separate partnership. Its income was part of the income of H. S. Anderson Co., returns for which were filed with the Collector at Los Angeles.

57. Not applicable.

58. Yes.

59. 5860 Avalon Boulevard, Los Angeles, California.

60. Howard Mann.

61. Said lots were sold through Title Insurance & Trust Co., escrow No. 2584537, dated March 21, 1947, to N. E. Rubinoff Ace Egg Products Co., for \$51,750.00.

62. The Douglas Oil and Refining Corp. was liquidated, commencing in the early spring of 1943, to the best of my knowledge, with the final liquidat-

ing distribution being received at the end of 1945 or beginning of 1946. To the best of my knowledge, three liquidating distributions were received during 1944 and 1945 on the 2,812 shares, aggregating \$2,443.63, as follows:

On or about November 21, 1944.....\$1,687.20

On or about May 2, 1945..... 562.40

On or about December 27, 1945..... 194.03

\$2,443.63

63. The Puett Starting Gate Co. stock was distributed to the members of the then partnership on or about November 30, 1947.

64. The oil lease was quit-claimed without consideration, to the best of my knowledge during 1943.

65. Robert H. Lovelock, c/o H. S. Anderson Co.

66. Same as No. 65.

67. Same as No. 65.

68. Same as No. 65.

69. Same as No. 65.

70. The same names, respectively, but different partners.

71. There was no partnership known as "Anderson Bros. Supply Co. of Nevada." That was a separate job operated by the California partnership.

72. Their contributions as partners of the California partnership.

73. Anderson Bros. Supply Co. of Nevada was merely a job account of H. S. Anderson Co.

74. The Anderson Bros. Supply Co. of Nevada was not a separate partnership. Dissolution was

governed by the provisions of the H. S. Anderson Co. Articles of Copartnership.

Dated March 10, 1952.

/s/ H. S. ANDERSON, JR.

Subscribed and sworn to before me this 10th day of March, 1952.

[Seal] /s/ MARY E. WHITTHORNE,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires November 26, 1953.

[Endorsed]: Filed March 10, 1952.

[Title of Court.]

MINUTES OF THE COURT

Sept. 14, 1953

H. S. Anderson, Jr. vs U.S.A. No. 12,044-C	Civil
Ethel H. Anderson vs U.S.A. No. 12,045-C	”
Robert W. Anderson vs U.S.A. No. 12,046-C	”
Gloria S. Anderson vs U.S.A. No. 12,047-C	”
John Hardy Anderson vs U.S.A. No. 12,048-C	”
(Same Order in Each Case)	

Present: Hon. James M. Carter, District Judge.
Counsel for plaintiff: no appearance;
Counsel for defendant: Edw. H. McHale,
Ass't U. S. Att'y.

Proceedings: For setting.

It Is Ordered that causes are set for futher Consolidated pretrial hearing at 2 PM, Dec. 21, 1953, and set for Consolidated trial Jan. 26, 1954, 10 AM.

EDMUND L. SMITH,

Clerk,

By L. B. FIGG,

Deputy Clerk.

[Title of District Court and Causes.]

STIPULATION OF FACTS

1. Harold S. Anderson, Sr., died intestate on December 27, 1941. Prior to and on the date of his death he was a member of a co-partnership (hereinafter referred to as the California partnership) consisting of himself and his son, H. S. Anderson, Jr., in which Harold S. Anderson, Sr., the decedent, owned a 75% interest and H. S. Anderson, Jr., owned a 25% interest. The business of said co-partnership consisted of subsistence contracting work (feeding and housing defense workers) and was conducted in the States of California and Nevada under the name of "H. S. Anderson." The California partnership was organized on January 1, 1938 by virtue of an oral agreement between the decedent and H. S. Anderson, Jr. Said oral agreement contained no provision for continuance of the partnership in the event of death of one of the partners.

2. Prior to and on the date of his death said Harold S. Anderson, Sr., the decedent, was a member of another co-partnership (hereinafter referred to as the Alaska partnership), consisting of himself and the Anderson sons, in which Harold S. Anderson, Sr., owned a 40% interest, Robert W. Anderson owned a 30% interest, John Hardy Anderson owned a 20% interest, and H. S. Anderson, Jr., owned a 10% interest. This co-partnership was engaged in similar activities within the territory of Alaska under the name of "Anderson Brothers Supply Company of Alaska." The Alaska partnership was created August 31, 1940, by the execution of a written partnership agreement, a true and correct copy of which may be offered in evidence as Exhibit 1.

3. As Exhibit 2, there may be offered in evidence a true and complete copy of an agreement dated December 11, 1942, between Orien H. Anderson, H. S. Anderson, Jr., Administrator, H. S. Anderson, Jr., Robert W. Anderson, John Hardy Anderson, and Orien H. Anderson, as Guardian of William Todd Anderson.

4. On December 23, 1942, H. S. Anderson, Jr., Robert W. Anderson, and John Hardy Anderson, as general partners, and Ethel Hamilton Anderson and Gloria S. Anderson, as limited partners, created two limited partnerships and executed an agreement in connection with each certificate of limited partnership, true and complete copies of which may be received in evidence as Exhibits 3, 4,

5 and 6, respectively. Said limited partnerships were cancelled on December 31, 1943 by mutual consent and agreement, which cancellations were thereafter evidenced by the execution of certificates of cancellation, true and complete copies of which may be received in evidence as Exhibits 7 and 8, respectively .

5. On December 27, 1941 the only activities of the Alaska partnership consisted of subsistence contract work in connection with the construction of the air base at Anchorage, Alaska, pursuant to a contract dated July 24, 1940, a true and complete copy of which may be received in evidence as Exhibit 9.

6. On December 27, 1941 the California partnership was engaged in the following subsistence work and/or had the following purchase orders or contracts for subsistence work:

(a) The operation of the post exchange fountain-grills at Camp San Luis Obispo, California, pursuant to an oral agreement entered into in or about March, 1941, later reduced to writing dated December 9, 1941, a copy of which may be received in evidence as Exhibit 10.

(b) The operation of the post exchange fountain-grills at Camp Roberts, California, pursuant to a contract dated June 5, 1941, a copy of which may be received in evidence as Exhibit 11. Said contract was cancelled by the Camp Roberts Post Exchange on February 1, 1943, due to change in military personnel and policy at this particular camp.

(c) The operation of the in-plant feeding facilities at the California Shipbuilding Yards, Terminal Island, California, pursuant to a contract dated September 2, 1941, a copy of which may be received in evidence as Exhibit 12. Said contract was cancelled by California Shipbuilding Corporation on July 27, 1942.

(d) The operation of the in-plant feeding facilities at the Douglas Aircraft Plant in Long Beach, California, pursuant to an oral agreement entered into on or about July 1, 1941, which agreement was cancelled by Douglas Aircraft Company on November 19, 1942.

(e) The California partnership, prior to the death of the decedent, and the surviving partner thereafter, received the following purchase orders from the Defense Plant Corporation, acting by and through Basic Magnesium, Inc., for the carrying on of subsistence work during the construction of the Basic Magnesium Plant near Los Vegas, Nevada:

Purchase Order Number	Date
211.....	December 8, 1941
Change Order No. 1....	December 15, 1941
Change Order No. 2.....	April 17, 1942
212.....	December 15, 1941
213.....	December 16, 1941
Change Order No. 1.....	April 14, 1942
214.....	December 15, 1941
Change Order No. 1.....	April 15, 1942
Change Order No. 2.....	May 18, 1942

Purchase Order Number	Date
1933.....	March 2, 1942
Change Order No. 1.....	May 2, 1942
Change Order No. 2.....	May 19, 1942
3836.....	April 21, 1942
6167.....	October 23, 1942
Change Order No. 1....	September 2, 1944

True and correct copies of said purchase and change orders may be received in evidence as Exhibit 13.

(f) Said Purchase orders and change orders were superseded by an agreement dated July 1, 1943 and by a settlement and release executed as of July 1, 1943, true and complete copies of which may be received in evidence as Exhibits 14 and 15, respectively.

(g) A reasonable estimate of the useful economic life of the respective contracts and purchase orders referred to in paragraph 5 and paragraph 6 above, as determined by an Internal Revenue Agent for the purpose of computing depreciation of physical equipment, was two years from and after December 31, 1941.

7. The partnership return of the new limited partnership returns "H. S. Anderson Co." for the years 1942 and 1943 showed as deductions the sums of \$58,082.52 and \$77,483.28 respectively, each of which figures included the sum of \$37,500.00 representing one-half of the \$75,000 required to be paid under Exhibit 2. The partnership returns filed for

the new limited partnership "Anderson Brothers Supply Company of Alaska" for the years 1942 and 1943 showed as deductions the sums of \$25,000.00 and \$25,000.00 respectively. The commissioner of Internal Revenue determined that said payments were not deductible by the partnerships or by the individual partners thereof, and as a result of said determination the partners (plaintiffs herein) paid to the Collector deficiencies in income tax for the year 1943, with interest thereon, which are the subject of these suits for refund.

8. There may be received in evidence as Exhibits 16 and 17 respectively, copies of the balance sheets of the California and Alaska partnerships as of December 31, 1941. There may be received as Exhibits 18 and 19 respectively, copies of Revenue Agent's Reports dated December 30, 1942, by Examining Officer O. M. Drotts covering the years 1939, 1940 and 1941 in the case of the California partnership and the year 1941 in the case of the Alaska partnership.

Dated: This 8th day of January, 1954.

MACKAY, McGREGOR,
REYNOLDS & BENNION,

By /s/ A. CALDER MACKAY,

By /s/ ADAM Y. BENNION,
Counsel for Plaintiffs.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Chief, Tax Division, Assistant
United States Attorney;

EUGENE HARPOLE,
Special Attorney,
Internal Revenue Service;

/s/ EDWARD R. McHALE,
Counsel for Defendant.

[Endorsed]: Filed January 13, 1954.

[Title of District Court and Causes.]

MINUTES OF THE COURT

Jan. 28, 1954

(Consolidated Cases)

Present: Hon. James M. Carter, District Judge.

Counsel for Plaintiffs: Adam Bennion.

Counsel for Gov't: Edw. R. McHale, Ass't
U. S. Att'y.

Proceedings: For consolidated trial. Both sides
answer ready.

Attorney Bennion makes opening statement for
plaintiffs.

Plf's Ex. 1 to 21 incl. are admitted in evidence.

Deft's Ex. A is admitted in evidence.

At 12:05 PM court recesses to 2 PM.

At 2 PM court reconvenes herein, and all being present as before, including counsel for both sides.

Harold S. Anderson, Jr., witness for defendants, is called, sworn, and testifies.

It Is Ordered that cause is continued to 10 a.m., Jan. 29, 1954, for further trial.

EDMUND L. SMITH,

Clerk;

By L. B. FIGG,

Deputy Clerk.

[Title of District Court and Causes.]

MINUTES OF THE COURT

Jan. 29, 1954

(Same Order in Each Case)

(Consolidated Cases)

Present: Hon. James M. Carter, District Judge.

Counsel for Plaintiffs: A. C. Mackay and
Adam Bennion;

Counsel for Gov't: Edw. R. McHale, Ass't
U. S. Att'y.

Proceedings: For further consolidated trial:

Harold S. Anderson, Jr., witness for plaintiff, heretofore sworn, testifies further.

Plfs' Ex. 22, 23, and 24 are admitted in evidence.

Deft's Ex. B is marked for ident.

Plaintiffs rest.

Defendant moves for judgment on the ground

that plaintiffs have failed to sustain their burden of proof at the close of plaintiffs' evidence.

Court Orders said motion denied.

Deft's Ex. B to X, incl., are admitted in evidence.

Defendant rests.

Plaintiffs rest in rebuttal.

Attorney Bennion argues to the Court for plaintiffs.

Attorney McHale argues to the Court for defendant.

It is Ordered that these Consolidated causes stand Submitted upon the filing of briefs 15x15x5, after the delivery of the reporter's transcript of proceedings to counsel by the reporter.

EDMUND L. SMITH,
Clerk,

By L. B. FIGG,
Deputy Clerk.

[Title of District Court and Causes.]

MEMORANDUM OF DECISION

It appears to the Court that the basic question in this case is what the plaintiffs bought. The Government contends they bought the interest of H. S. Anderson, deceased, in the California and Alaska partnerships; that there has been since no sale or transfer of these interests they bought, and being thus a capital investment, the amounts paid may not be deducted from their income tax returns. The

Government also contends that if the plaintiffs bought such interests of H. S. Anderson, deceased, in the two partnerships, the amounts paid may not be allocated to specific items. It distinguishes the Nathan Blum case, where such allocation was made, as being a case where the sole surviving partner bought the interest of the deceased partner with the result that a sole proprietorship and not a partnership resulted.

Plaintiffs contend that they bought specific items: namely, the contracts which the prior partnerships were operating, and that since it was stipulated that such contracts had a life of two years and were completely depleted in 1942 and 1943, plaintiffs should be entitled to deduct what they paid from their incomes and thus recoup their payments in the two years, or at least in the year 1943.

The interest of H. S. Anderson, Sr., in the California partnership at the time of his death was 75% and his son, H. S. Anderson, Jr., owned a 25% interest. The deceased at his death owned 40% interest in the Alaska partnership and his three sons, plaintiffs herein, owned the remaining interest in varying shares.

The parties have stipulated that the two partnerships are controlled by California law. The Uniform Partnership Act was adopted in 1929. At the time in question the sections were in the Civil Code (1941 Ed.), Sections 2418 to 2436. In 1949 the sections were carried over without change into the Corporation Code.

Applying California law to the situation at Anderson's death on December 27, 1941, we see the following:

(1) "A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property." (Section 2420, Civil Code) The word "surplus" is well adjudicated, and means the excess of assets over liabilities.

(2) The death of a partner is cause for dissolution (Section 2425, Civil Code), but a partnership is not terminated by dissolution (Section 2424, Civil Code). On his death, the interest of a deceased partner vests in the surviving partner or partners (unless he was the last surviving partner, and then his interest vests in his legal representative) (Section 2419, Civil Code.)

(3) The surviving partner carries on the partnership for the purpose of winding up the affairs and thus eventually achieving termination (Civil Code Section 2431).

This is exactly what happened in this case. From December 27, 1941, to December 11, 1942, the partnership continued and a Court order was made in the estate proceeding authorizing the business to continue.

On December 11, 1942, agreements were entered into by which the interests of H. S. Anderson, deceased, in the two partnerships were purchased

from his estate; \$75,000 was paid for his interest in the California partnership and \$50,000 for his interest in the Alaska partnership.

(4) This was strictly in compliance with Section 2436, Civil Code. The legal representative was entitled at his option to interest on this amount or the share of profits earned while the partnership continued after death. He chose profits, and the sum of \$228,369.32 was paid into the estate representing this share. This was in accordance with Section 2436, Civil Code.

We pause to note that the agreement of December 11, 1942, and the probate orders show on their face that what was purchased was the interest of the deceased in the partnership. However, tax laws proceed on principles similar to equity in order to determine the reality of situations. So we inquire further.

On its face the agreement by H. S. Anderson, Jr., to purchase the interest of his deceased father in the California partnership appears similar to the Nathan Blum situation, since the purchaser was the sole remaining partner. But the plaintiff proved that all the transactions were part of one plan and that the plaintiffs and their wives had agreed to form the new partnerships and that H. S. Anderson, Jr., acted for himself, his brothers and their wives (the remaining plaintiffs) in purchasing the interest of his father. Similar was the situation concerning the Alaska partnership, when the sons of the deceased

purchased but acted for their wives also pursuant to agreement (Tr. 111-112). Also proof of the financing entered into, in obtaining the money for the purchases, shows the plan and intent.

These facts take the purchase by H. S. Anderson, Jr., of the 75% interest out of the Blum case situation. We do not pass on whether or not we agree with its holding.

Now to a determination of the cases. We think:

(1) That plaintiffs have failed in their burden of proof to show purchase of particular assets.

No proof whatever was offered on the value of the contracts assets at the time of the death of deceased or on December 11, 1942, or what was the value of other assets if the contracts had a value. The written agreements speak of buying an interest in the partnerships. Though plaintiffs (one or more) were members of the prior partnerships, the contracts were never set up on the books as capital assets. The adjusted balance sheet shows the deceased's interest in the California partnership to be in excess of \$71,000 without the alleged contracts being listed as capital assets.

It may well be true that the prospects of profits from the contracts impelled the purchase. However, not the contracts, but the interest of the deceased in the partnership was purchased, i.e., his right to his share of the surplus of assets over liabilities (Civil Code, Sec. 2420).

The Courts cannot characterize the situation as one involving good will. If good will was purchased, it cannot be amortized. The record shows that good will was not purchased (Tr. 58, 148), unless it was the small difference between \$75,000 and the \$71,000 value of the deceased's interest in the partnership according to the revised balance sheet.

There was no dispute that the new partnerships were cancelled at the end of 1943. But there was no evidence of what was distributed on their dissolution or of any sale of the partnership or of the value as of that date of the whole of each partnership or of any particular per cent in either one. The Court cannot say what the value of the 75% and the 40% interests in the two partnerships were as of December 31, 1943. This would have been susceptible of proof. But plaintiffs chose not to consider that they had purchased an interest in each partnership which was a capital asset.

But plaintiffs argue that the interest cannot be followed since the old partnerships ended on December 11, 1942. But there is no reason why the base thus established could not be carried through as in all tax accounting. The new partnerships carried on the business of the old. The percentages held by the former partner's sons were retained and the interest of the deceased father was divided among the sons and the daughters-in-law who supplied the consideration to buy the interest of the deceased father. Thus the identity of the interest purchased was preserved and can be followed.

Thus we have:

	Old Calif. Partnership	New Partnership
H. S. Anderson, Sr.	75%	—
H. S. Anderson, Jr.	25%)	42.5%
Ethel Anderson (his wife)	—)	7.5
Robert Anderson	—)	21.5
Gloria Anderson (his wife)	—)	3.75
John Anderson	—	25.00
	<hr/>	<hr/>
	100%	100%

Thus there is no dispute that the 75% interest of the deceased father was split three ways to each of the sons and their wives. The proof shows this was the way the matter was handled and the consideration paid.

In the Alaska partnership the situation was as follows:

	Old Alaska Partnership	New Partnership
H. S. Anderson, Sr. (deceased)	40%	—
Robert Anderson	30%	30%
Gloria Anderson (his wife)	—	31 $\frac{1}{3}$
John Anderson	20	33 $\frac{1}{3}$
H. S. Anderson, Jr.	10	25
Ethel Hamilton	—	81 $\frac{1}{3}$
	<hr/>	<hr/>
	100%	100%

Thus each surviving old partner retained the percentage he had, and the 40% purchased from the estate of the deceased father was split among the sons and their wives, and consideration paid therefor, as follows:

H. S. Anderson, Jr.....	15%
Ethel (his wife)	81⅓%
Robert Anderson	
Gloria (his wife).....	31⅓%
John Anderson	131⅓%
(no wife)	
<hr/>	
	40%

Thus the identity of the 75% and the 40% interest in the old partnerships were carried over into the new, and carried the same percentage in the new partnerships. The purchase price was a capital investment and became the base for each interest in the new partnerships.

(2) The Court finds that interests in the partnership were purchased and not specific assets, on the same reasoning as above, and believes the cases are controlled by *Stelgenbaur v. U. S.* (9 Cir. 1940), 115 F.(2d) 283, *Commissioner v. Shapiro* (6 Cir. 1942), 125 F.(2d) 532, and *Thornley v. Commissioner* (3 Cir. 1945), 147 F.(2d) 416.

There was no reason why the plaintiffs could not have purchased the specific contracts if they so desired. The surviving partner or partners as part of dissolution, looking to termination, could have purchased specifically the contracts and capitalized them in the new partnerships. The Court knows of no reason why the surviving partner, during dissolution, may not sell for a fair price partnership assets and reduce them to cash. The remaining interest of the deceased after the conversion of specific assets to cash could have also been purchased.

Why was this not done? If the contracts were worth \$100,000 in the California partnership (plaintiffs contend the deceased's 75% interest was worth \$75,000), then the new partnership or the sons acting for the new partnership would have had to pay into the old partnership \$100,000. The old partnership would then have held the cash instead of the contracts. To then purchase the interest of the deceased in the California partnership, the buyer would certainly have had to pay more than \$75,000. It is obvious the partnership had other assets; and witness the \$71,000 value of the deceased's interest on the books, without the contracts being set up as assets. The realities are that the widow and the probate court would have insisted on closer to \$150,000 for the value of the interest in the partnership had the conversion of the contracts to cash taken place.

The result of such conversion would have been to clearly capitalize the contracts in the old partnership, something that had never been done.

True, the three sons involved here, who each took $\frac{1}{6}$ of the separate property of their father, would have recovered from the estate approximately $\frac{1}{2}$ ($3 \times \frac{1}{6}$) of the additional amount paid for the partnership interests. The widow and the fourth son (the minor) would have recovered from the estate $\frac{1}{2}$ the additional amount received for the partnership interests in such method of handling.

Plaintiffs have been represented here and in their dealings with the estate by able counsel. We con-

clude the actions of plaintiffs were taken advisedly and the alternatives above rejected.

At first blush, the equities of the case seemed heavily in favor of plaintiffs, but the deceased partner and his partner sons, before his death, never treated the contracts as capital items. Now, through the incident of death, the plaintiffs claim the right to recoup what they paid for their father's interest in the partnerships.

Certainly the acts of the deceased and the plaintiffs, as partners in the old partnerships, throw light on their intent and on the realities of the situation.

Dated: June 30, 1954.

/s/ JAMES M. CARTER,
U. S. District Judge.

[Endorsed]: Filed June 30, 1954.

[Title of District Court and Causes.]

MINUTES OF THE COURT

June 30, 1954

Present: The Honorable James M. Carter, District Judge.

These cases having been submitted after trial and the Court having duly considered them,

The Court now hands down its memorandum of decision, finding in favor of defendant and against the plaintiff in each case, and in accordance with said memorandum,

It Is Ordered that counsel for defendant prepare findings of fact, conclusions of law and judgments, pursuant to local Rule 7, and submit them to the Court within ten days.

EDMUND L. SMITH,
Clerk;

By L. B. FIGG,
Deputy Clerk.

[Title of District Court and Causes.]

STIPULATION

It Is Hereby Stipulated by and between the above-named parties, through their respective counsel, that the law of the State of California shall govern the disposition of any question arising out of the existence, termination or dissolution of any of the partnerships involved in the above-entitled proceedings.

/s/ ADAM Y. BENNION,
Counsel for Plaintiffs.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States
Attorney;

/s/ EDWARD R. McHALE,
Counsel for Defendant.

It is so ordered: 6/30/54.

/s/ JAMES M. CARTER.
Judge.

[Endorsed]: Filed June 30, 1954.

[Title of District Court and Causes.]

MINUTES OF THE COURT

March 18, 1955
At Los Angeles, Calif.

(Same Order in Each Case.)

Present: Hon. James M. Carter, District Judge.
Counsel for Plaintiffs: No appearance.
Counsel for Gov't: No appearance.

Proceedings:

It Is Ordered that the plaintiffs' objections to defendant's proposed Findings of Fact and Conclusions of Law are overruled, except as to such interlineal changes made by the Court in the proposed findings, as to which the objections are sustained, and Court signs the findings of facts, conclusions of law and judgment.

EDMUND L. SMITH,
Clerk;

By L. B. FIGG,
Deputy Clerk.

[Title of District Court and Cause.]

No. 12044-C Civil

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above case came on regularly for trial on January 28 and 29, 1954, before the Hon. James M. Carter, United States District Judge, sitting without a jury, the plaintiff appearing through its counsel, Mackay, McGregor, Reynolds and Bennion, by Adam Y. Bennion, Esq., and the defendant appearing through its counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Edward R. McHale, Assistant United States Attorney for said District, Chief, Tax Division, was consolidated for trial with the cases of Ethel H. Anderson v. United States of America, No. 12045-C; Robert W. Anderson v. United States of America, No. 12046-C; Gloria S. Anderson v. United States of America, No. 12047-C; and John Hardy Anderson v. United States of America, No. 12048-C; and evidence both oral and documentary having been received and the matter having been submitted on the evidence, written memoranda and oral argument, and the Court having duly considered the same and on June 30, 1954, having filed its Memorandum of Decision and Order to Prepare Findings of Fact, Conclusions of Law and Judgment, the Court now finds as follows:

Findings of Fact

I.

The plaintiff is an individual residing in Los Angeles, California, within the Southern Judicial District of California, Central Division.

II.

The defendant is a corporation sovereign and body politic. The taxes and interest for the recovery of which this action is brought were paid to and collected by Harry C. Westover, who was, at the time of such payment and collection, the duly appointed, qualified and acting Collector of Internal Revenue in and for the Sixth Collection District of the State of California. Said Harry C. Westover was not in office as said Collector of Internal Revenue at the time this action was commenced.

III.

The plaintiff paid a deficiency of income tax for the year 1943 in the sum of \$18,131.61 and interest thereon in the sum of \$3,103.24, to the aforesaid former Collector of Internal Revenue, Harry C. Westover, in the amounts and on the dates as follows:

\$5,000.00 on February 26, 1947; \$15,332.59 on March 19, 1947; \$902.32 on March 25, 1947, and \$0.06 by transfer to a January account.

IV.

Plaintiff filed with the Collector of Internal Revenue on December 28, 1948, a claim for refund of

the deficiency paid by plaintiff in the amount set forth in the immediately preceding paragraph, the claim for refund was based on several alleged alternative grounds, which were that either the plaintiff or a partnership or partnerships of which plaintiff was a member made payments to the estate of H. S. Anderson, Sr., which payments were allowable as deductions for expenses under I.R.C. §§ 23(a)(1) or 23(a)(2), from income tax for the year 1943; or that they were deductible by a limited partnership, and the partners thereof including plaintiff, in 1944, when the limited partnerships were terminated and dissolved; or that they were payments which were to be capitalized and then amortized and depreciated over the useful life of the property acquired thereby, to wit, certain contracts; or that a loss deduction was incurred in the year 1943 when the value of the contracts were exhausted; or that a loss was similarly suffered in 1944 which would, as a net operating loss, be carried back to prior years and then deducted. On August 29, 1949, the Commissioner of Internal Revenue rejected in full plaintiff's claim for refund.

V.

On or before March 15, 1945, the plaintiff paid income taxes for the year 1944 in the sum of \$3,920.20 to the aforesaid former Collector of Internal Revenue, Harry C. Westover. On March 15, 1948, the plaintiff filed with said Collector of Internal Revenue a claim for refund of the total income tax paid by plaintiff for the calendar year

1944 upon the alleged grounds that if the payments made to the Estate of H. S. Anderson, Sr., during the years 1942 and 1943 were not properly deductible for those years, they were deductible by the limited partnerships and the partners thereof in 1944, when said limited partnerships were terminated and dissolved, and that not only would refunds of the entire amounts of 1944 taxes be proper, but that each partner would be entitled to a carry-back loss, which would entitle him or her, in addition, to a refund of a portion of the deficiency paid for the year 1943.

VI.

This action was commenced on August 4, 1950, within the time required by law and arises under the Internal Revenue laws of the United States.

VII.

Harold S. Anderson, Sr., died intestate on December 27, 1941. Prior to and on the date of his death he was a member of a co-partnership (hereinafter referred to as the California partnership) consisting of himself and his son, H. S. Anderson, Jr., in which Harold S. Anderson, Sr., the decedent, owned a 75% interest and H. S. Anderson, Jr., owned a 25% interest. The business of said co-partnership consisted of subsistence contracting work (feeding and housing defense workers) and was conducted in the States of California and Nevada under the name of "H. S. Anderson." The California partnership was organized on January 1, 1938, by virtue of an oral agreement between the

decedent and H. S. Anderson, Jr. Said oral agreement contained no provision for continuance of the partnership in the event of death of one of the partners.

VIII.

Prior to and on the date of his death said Harold S. Anderson, Sr., the decedent, was a member of another co-partnership (hereinafter referred to as the Alaska partnership), consisting of himself and the Anderson sons, in which Harold S. Anderson, Sr., owned a 40% interest, Robert W. Anderson owned a 30% interest, John Hardy Anderson owned a 20% interest, and H. S. Anderson, Jr., owned a 10% interest. This co-partnership was engaged in similar activities within the territory of Alaska under the name of "Anderson Brothers Supply Company of Alaska." The Alaska partnership was created August 31, 1940, by the execution of a written partnership agreement.

IX.

On December 11, 1942, an agreement was made and entered into between Orien H. Anderson, widow of H. S. Anderson, H. S. Anderson, Jr., as Administrator of the Estate of H. S. Anderson, Deceased, H. S. Anderson, Jr., individually, Robert W. Anderson, and John Hardy Anderson, sons by a former marriage, and Orien H. Anderson, as Guardian of the person and estate of William Todd Anderson, a minor, whereby the said parties made certain declarations and admissions for the purpose of settling certain controversies and differences between

them relative to the extent and character of the estate of H. S. Anderson, deceased. As recited in said written agreement, for a valuable consideration received by each of the parties thereto and in further consideration of the promises and agreements by each of the parties thereto to be performed, among other things it was agreed as follows:

“2. Prior to and at the time of the death of H. S. Anderson, deceased, on December 27, 1941, he was a member of a co-partnership consisting of himself and his son, H. S. Anderson, Jr., in which H. S. Anderson, deceased, owned a 75% interest, and H. S. Anderson, Jr., a 25% interest of said co-partnership. The business of said co-partnership consisted of all of the enterprises then carried on and now being carried on in the States of California and Nevada. Prior to and at the time of the death of H. S. Anderson, deceased, the business of said co-partnership was conducted under the name of ‘H. S. Anderson’; and subsequent to the death of H. S. Anderson, deceased, said business has been conducted in part under the name of ‘Anderson Bros. Supply Co. of Nevada.’ The said co-partnership will herein be referred to as ‘The California Partnership.’

“3. Prior to and at the time of the death of H. S. Anderson, deceased, he was a member of a co-partnership consisting of himself and Anderson’s Sons, in which H. S. Anderson, deceased, owned a 40% interest, Robert W. Anderson owned a 30% interest, John Hardy Anderson owned a 20% interest, and H. S. Anderson, Jr., owned a 10% interest. The

business of the said co-partnership consisted of all of the enterprises then carried on and now being carried on in the Territory of Alaska. The business of said co-partnership has been and now is being carried on under the name of Anderson Bros. Supply Co. of Alaska. The said co-partnership will hereinafter be referred to as the Alaska Partnership.

* * *

“5. The parties hereto have investigated and it is agreed that the interest of H. S. Anderson, deceased, at the time of his death, in the foregoing partnerships and his other property was as follows:

“(a) In the California Partnership, a 75% interest, which interest was the separate property of H. S. Anderson, deceased;

“(b) In the Alaska Partnership, a 40% interest thereof, which interest was the community property of H. S. Anderson, deceased, and Mrs. Anderson;

* * *

“6. H. S. Anderson, Jr., as surviving partner of the California Partnership, in full satisfaction and discharge of all claims of the estate of H. S. Anderson, deceased, and of the heirs of H. S. Anderson, deceased, for and on account of the interest of said H. S. Anderson in his lifetime and that his estate has acquired since his death in and to the California Partnership, hereby agrees to pay into the estate of H. S. Anderson, deceased, the following sums of money:

“(a) The sum of \$75,000.00, representing, as the parties hereto agree, the fair market value at date of the death of the decedent, of his interest in said California partnership;

* * *

“8. H. S. Anderson, Jr., Robert W. Anderson, and John Hardy Anderson, as surviving partners of The Alaska Partnership, in full satisfaction and discharge of all claims of the estate of H. S. Anderson, deceased, and of the heirs of H. S. Anderson, deceased, for and on account of the interest of H. S. Anderson in his lifetime and that his estate has acquired since his death in and to The Alaska Partnership, hereby agree to pay into the estate of H. S. Anderson, deceased, the following sums of money:

“(a) The sum of \$50,000.00, representing, as the parties hereto agree, the fair market value at date of death of the decedent of his interest in said Alaska Partnership;

“(b) The sum of \$38,000.00, representing, as the parties hereto agree, the estate's share of the profits of The Alaska Partnership from the date of the death of the decedent, December 27, 1941, to the date of this agreement.

* * *

“17. All the parties hereto agree that the real property and the improvements thereon, said real property being described as follows:

“Lots 65 and 66, in the Industrial Center Tract, in the County of Los Angeles, State of

California, as per map recorded in Book 12, page 101, of Maps, in the office of the County Recorder of said County,

“and also the shares of stock of Douglas Oil & Refining Corporation, although in the record name of H. S. Anderson, are in reality the property of The California Partnership, and all parties hereto will join in such proceedings as may be proper, convenient or necessary to effectuate quieting title to that effect.

* * *

“22. In addition to the property set forth in paragraph 17, hereof, there is also a certain oil lease in Ventura County and certain Puett Starting Gate Company stock which is in the name of H. S. Anderson, deceased, but which is the property of the California co-partnership and which is to be handled as provided for in said paragraph 17.”

X.

Said agreement of December 11, 1942, between Orien H. Anderson in her personal capacity and in her capacity as guardian for her son, William Todd Anderson, a minor, H. S. Anderson, Jr., as administrator of the Estate of H. S. Anderson, Deceased, and individually, Robert W. Anderson and John Hardy Anderson was approved by the Superior Court of the State of California in and for the County of Los Angeles, sitting as a court of probate, on December 22, 1942, by order of Court which further found as follows:

“That H. S. Anderson, deceased, owned a 75% interest in a California partnership known as H. S. Anderson, also known as H. S. Anderson Co., which interest was separate property.

“That H. S. Anderson, Deceased, owned a 40% interest in a partnership known as Anderson Bros. Supply Co. of Alaska, which interest was community property. * * *

“That the value of the estate’s interest in the California partnership as of the date of death was \$75,000.00.

“That the value of the estate’s interest in the Alaska partnership as of the date of death was \$50,000.00. * * *

“That H. S. Anderson, Jr., as the surviving partner of the California partnership, in full satisfaction and discharge of all claims of the Estate of H. S. Anderson, deceased, and of the heirs of H. S. Anderson, deceased, for and on account of the interest of said H. S. Anderson in his lifetime and that his estate has acquired since his death in and to the California partnership, shall pay into the Estate of H. S. Anderson, deceased, the following sums of money:

“(a) The sum of \$75,000.00, representing the fair market value at date of the death of the decedent of his interest in said California partnership. * * *

“That said H. S. Anderson, Jr., Robert W. Anderson, and John Hardy Anderson, as surviving partners of the Alaska partnership, in full satis-

faction and discharge of all claims of the Estate of H. S. Anderson, deceased, and of the heirs of H. S. Anderson, deceased, for and on account of the interest of H. S. Anderson in his lifetime and that his estate has acquired since his death in and to the Alaska partnership, shall pay into the estate of H. S. Anderson, deceased, the following sums of money:

“(a) The sum of \$50,000.00, representing the fair market value at date of death of the decedent of his interest in said Alaska partnership. * * *”

XI.

On December 27, 1941, the only activities of the Alaska partnership consisted of subsistence contract work in connection with the construction of the air base at Anchorage, Alaska, pursuant to a lease contract dated July 24, 1940, the lease contract and operations thereunder being terminable at the will of the Secretary of War.

XII.

On December 27, 1941, the California partnership was engaged in the following subsistence work and/or had the following purchase orders or contracts for subsistence work:

(a) The operation of the post exchange fountain-grills at Camp San Luis Obispo, California, pursuant to an oral agreement entered into in or about March, 1941, later reduced to writing dated December 9, 1941, terminable on 30 days' notice by either party.

(b) The operation of the post exchange fountain-grills at Camp Roberts, California, pursuant to a contract dated June 5, 1941, terminable on 60 days' notice by either party. Said contract was cancelled by the Camp Roberts Post Exchange on February 1, 1943, due to change in military personnel and policy at this particular camp.

(c) The operation of the in-plant feeding facilities at the California Shipbuilding Yards, Terminal Island, California, pursuant to a contract dated September 2, 1941, terminable on 48 hours' notice by California Shipbuilding Corporation. Said contract was cancelled by California Shipbuilding Corporation on July 27, 1942.

(d) The operation of the in-plant feeding facilities at the Douglas Aircraft Plant in Long Beach, California, pursuant to an oral agreement entered into on or about July 1, 1941, which agreement was cancelled by Douglas Aircraft Company on November 19, 1942.

(e) The California partnership, prior to the death of the decedent, and the surviving partner thereafter, received the following purchase orders from the Defense Plant Corporation, acting by and through Basic Magnesium, Inc., for the carrying on of subsistence work during the construction of the Basic Magnesium Plant near Las Vegas, Nevada:

Purchase Order Number

Date

211December 8, 1941

Change Order No. 1....December 15, 1941

Change Order No. 2.....April 17, 1942

Purchase Order Number	Date
212	December 15, 1941
213	December 16, 1941
Change Order No. 1.....	April 14, 1942
214	December 15, 1941
Change Order No. 1.....	April 15, 1942
Change Order No. 2.....	May 18, 1942
1933	March 2, 1942
Change Order No. 1.....	May 2, 1942
Change Order No. 2.....	May 19, 1942
3836	April 21, 1942
6167	October 23, 1942
Change Order No. 1.....	September 2, 1944

(f) Said Purchase orders and change orders were superseded by settlement and release dated July 1, 1943, and by a new contract executed as of July 1, 1943, terminable by either party on 90 days' notice.

(g) A reasonable estimate of the useful economic life of the respective contracts and purchase orders referred to in paragraph XI and paragraph XII (a) to (e) above, as determined by an Internal Revenue Agent for the purpose of computing depreciation of physical equipment, was two years from and after December 31, 1941.

XIII.

The partnership return of the new limited partnership returns "H. S. Anderson Co." for the years 1942 and 1943 showed as deductions the sums of \$58,082.52 and \$77,483.28, respectively, each of which figures included the sum of \$37,500.00 representing one-half of the \$75,000.00 required to be paid under

the agreement dated December 11, 1942, between Orien H. Anderson, H. S. Anderson, Jr., administrator, H. S. Anderson, Jr., Robert W. Anderson, John Hardy Anderson, and Orien H. Anderson as guardian of William Todd Anderson.

XIV.

At the time of the death of H. S. Anderson, Sr., he had an interest in the California partnership of 75% and his son, H. S. Anderson, Jr., owned a 25% interest. At the time of his death the decedent owned a 40% interest in the Alaska partnership and his three sons owned the remaining interest in varying shares.

XV.

The plaintiff has failed to show by preponderance of evidence that H. S. Anderson, Jr., purchased particular assets of the California partnership, the H. S. Anderson Co., from the estate of H. S. Anderson, Deceased, and has failed to show that H. S. Anderson, Jr., Robert W. Anderson and John Hardy Anderson, purchased particular assets of the Alaska partnership from the estate of his father.

XVI.

Whatever contracts were in existence at the time of death of the deceased had no substantial value and had as a value only a small percentage of the value of \$100,000.00 contended for by plaintiffs. The contracts were never set up on the books of the partnerships as capital assets and never carried any value on the books.

XVII.

At the time of decedent's death, the balance sheet of the California partnership as properly adjusted indicates that the decedent had an interest in the California partnership in excess of \$71,000.00, without the alleged contracts being listed as assets.

XVIII.

The \$75,000.00 paid by H. S. Anderson, Jr., for his father's interest in the California partnership was for the payment of an interest; and the difference between \$71,000.00 adjusted book value of that interest and the \$75,000.00 paid was his right to his share of the excess of assets over liabilities, and the \$4,000.00 difference, if anything, was good will or going concern value.

XIX.

On December 23, 1942, a limited partnership for the operation of the Anderson Bros. Supply Co. of Alaska was entered into between H. S. Anderson, Jr., Robert W. Anderson, John Hardy Anderson, Ethel Hamilton Anderson, the wife of H. S. Anderson, Jr., and Gloria S. Anderson, the wife of Robert Anderson. The new limited partnership was terminated and dissolved on December 31, 1943, by mutual consent and agreement. There is no evidence in the record of what was distributed on the dissolution. There is no evidence in the record of any sale of the partnership. There is no evidence in the record of the value of the partnership as of the date of dissolution and termination of the whole of the

partnership or of any particular partner's percentage of interest in either partnership.

XX.

There was formed on December 23, 1942, by and between H. S. Anderson, Jr., Robert W. Anderson, John Hardy Anderson and Ethel Hamilton Anderson, the wife of H. S. Anderson, Jr., and Gloria S. Anderson, the wife of Robert Anderson, a limited partnership known as the H. S. Anderson Company to carry on the business theretofore known as the H. S. Anderson Co. and the Anderson Bros. Supply Co. of Nevada. Said limited partnership was terminated and dissolved as of the close of business on December 31, 1943, by mutual consent and agreement. There is no evidence in the record of what was distributed on the dissolution of the partnership. There is no evidence in the record of any sale of the partnership. There is no evidence in the record of the value of the partnership as of the date of the dissolution and termination of the whole of the partnership or of any particular partner's percentage of interest in either partnership.

XXI.

The new partnerships, to wit, the limited partnerships of H. S. Anderson Co. and the Anderson Bros. Supply Co. of Alaska, carried on the business of the old partnerships. The percentages held by the former partner's sons were retained and the interest of the deceased father was divided among the sons and the daughters-in-law who supplied the consid-

eration to buy the interest of the deceased father. Thus, the identity of the interest purchased was preserved and can be followed.

Thus we have:

	Old Calif. Partnership	New Partnership
H. S. Anderson, Sr.	75%	—
H. S. Anderson, Jr.	25%)	42.5%
Ethel Anderson (his wife)	—)	7.5
Robert Anderson	—)	21.5
Gloria Anderson (his wife)	—)	3.75
John Anderson	—	25.00
	<hr/>	<hr/>
	100%	100%

The 75% interest of the deceased father was split three ways to each of the sons and their wives. This is the way the matter was handled and consideration paid.

XXII.

Identity of the interest purchased was preserved as well in the Alaska partnership and can be followed.

Thus we have:

	Old Alaska Partnership	New Partnership
H. S. Anderson, Sr. (deceased)	40%	—
Robert Anderson	30%)	30%
Gloria Anderson (his wife)	—)	31 $\frac{1}{3}$
John Anderson	20%	33 $\frac{1}{3}$
H. S. Anderson, Jr.	10%	25
Ethel Hamilton	—	8 $\frac{1}{3}$
	<hr/>	<hr/>
	100%	100%

Thus each surviving old partner retained the percentage he had, and the 40% purchased from

the estate of the deceased father was split among the sons and their wives, and consideration paid therefor, as follows: .

H. S. Anderson, Jr.	15%
Ethel (his wife)	8 $\frac{1}{3}$ %
Robert Anderson	
Gloria (his wife)	3 $\frac{1}{3}$ %
John Anderson (no wife)	13 $\frac{1}{3}$ %
<hr/>	
Total	40%

XXIII.

The identities of the 75% and 40% interest in the old partnerships were carried over into the new, and carried the same percentage in the new partnerships. The purchase price was a capital investment and became the base for each interest in the new partnerships.

XXIV.

Interests in the respective partnerships were purchased and not specific assets. The sons and their wives could have purchased the specific contracts if they desired but did not do so. Had they done so, and paid into the estate \$100,000.00 which they contend is the value of the contracts they could not have purchased thereafter, the interest of the decedent in the California partnership for \$75,000.00 and interest in the Alaska partnership for \$40,000.00 as the partnerships had other assets and had the value that the plaintiffs now contend been placed upon them, they would have had to pay closer to \$150,000.00 for the interest of the decedent in the California partnership alone.

XXV.

The three brothers, H. S., Jr., Robert and John, could have purchased the contracts for cash and thus capitalized the contracts in the partnership, but that was not done. Had such a course been taken, the three sons involved here, who each took $\frac{1}{6}$ of the separate property of the father, would have recovered from the estate approximately $\frac{1}{2}$ (three times $\frac{1}{6}$), of the additional amount paid for the partnership interest. The widow and the fourth son (the minor) would have recovered from the estate one-half the additional amount received for the partnership interest in such method of handling. The three brothers have been represented and were represented in their dealings with the estate by able counsel and the actions of the plaintiffs and the brothers and sisters-in-law were taken advisedly and the alternatives above rejected

XXVI.

Before and up to the date of his death, the decedent and his partner-sons never treated the contracts as capital items. The acts of the deceased on the plaintiffs as partners in the old partnerships have a bearing on their intent and the realities of the situation.

XXVII.

The plaintiff has failed to establish that the California partnership had an asset of substantial value at the date of H. S. Anderson, Senior's death in what later consisted of a subsistence business at

the Basic Magnesium plant at Roysen, Nevada. On the contrary, the evidence indicates that very little beyond preliminary negotiations for the carrying on of a subsistence business had been consummated at the time of his death, that all the parties to the matter reconsidered it after the death, and only after being assured by H. S. Anderson, Jr., and his father-in-law, that H. S. Anderson, Jr., and his brothers were willing, and able, in their own right to carry it on, were further purchase orders given to H. S. Anderson. The method of arranging for the subsistence business to be carried on was by purchase orders executed by the contractor alone and not until July 1, 1943, was a binding bilateral contract between H. S. Anderson Co. and the contractor entered into, which was a year and a half after the death of H. S. Anderson and long after the purchase of the interest of H. S. Anderson, deceased, from his estate and the formation of a new limited partnership between the sons and sisters-in-law of the sons and wives of the Anderson sons. The contracts have no value, were not purchased and could not be deducted as expenses paid for the production or collection of income, or the management, conservation or maintenance of property held for the production of income, or could not be capitalized and amortized or depreciated or allowed as a loss in either 1943 or 1944.

And from these facts the Court concludes as follows:

Conclusions of Law

I.

The Court has jurisdiction of this controversy and of the parties hereto.

II.

The plaintiff has failed to sustain plaintiff's burden of proof that the defendant erroneously and illegally assessed and collected from plaintiff income tax for years 1943 and 1944 and erroneously and illegally failed and refused to allow plaintiff's claims for refund and to refund to plaintiff the amounts claimed.

III.

H. S. Anderson, Jr., Robert Anderson and John Anderson purchased the interest of H. S. Anderson, deceased, in the two partnerships known as H. S. Anderson Co. and Anderson Supply Co. of Alaska, and not specific assets or specific contracts by the payment to the estate of the father of the sums of \$75,000.00 and \$40,000.00.

IV.

The plaintiff has not overpaid plaintiff's income tax for either 1943 or 1944.

V.

The sums paid by H S. Anderson, Jr., and his brothers for their interest in the California and Alaska partnerships are not deductible as expenses under any provisions of the Internal Revenue Code, are not amortizable, cannot be capitalized and depreciated and did not give rise to deductible losses in 1943 or 1944 or loss carrybacks from 1944 to 1943.

VI.

Defendant is entitled to judgment that the plaintiff take nothing and for dismissal of the complaint with prejudice, and for its costs.

Dated: This 18th day of March, 1955.

/s/ JAMES M. CARTER,

United States District Judge.

Lodged February 1, 1955.

[Endorsed]: Filed March 18, 1955.

United States District Court for the Southern
District of California, Central Division
No. 12044-C Civil

H. S. ANDERSON, JR.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above case came on regularly for trial on January 28, and 29, 1954, before the Hon. James M. Carter, United States District Judge, sitting without a jury, the plaintiff appearing through his counsel, Mackay, McGregor, Reynolds and Bennion, by Adam Y. Bennion, Esq., and the defendant appearing through its counsel Laughlin E. Waters, United States Attorney for the Southern District of

California, and Edward R. McHale, Assistant United States Attorney for said District, Chief, Tax Division, was consolidated for trial with the cases of Ethel H. Anderson v. United States of America, No. 12045-C; Robert W. Anderson v. United States of America, No. 12046-C; Gloria S. Anderson v. United States of America, No. 12047-C; and John Hardy Anderson v. United States of America, No. 12048-C; and evidence both oral and documentary having been received and the matter having been submitted on the evidence, written memoranda and oral argument, and the Court having duly considered the same and on June 30, 1954, having filed its Memorandum of Decision, and having filed its Findings of Fact and Conclusions of Law and ordered that judgment be entered for the defendant in accordance with said Findings and Conclusions;

Now, Therefore, it is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing by his complaint, that the above-entitled action be dismissed with prejudice, and that defendant have judgment for and shall recover from plaintiff the amount of defendant's costs to be taxed by the Clerk of this Court in the sum of \$104.15.

Judgment rendered this 18th day of March, 1955.

/s/ JAMES M. CARTER,

United States District Judge.

Lodged February 1, 1955.

[Endorsed]: Filed March 18, 1955.

Docketed and entered March 22, 1955.

United States District Court for the Southern
District of California, Central Division

No. 12045-C Civil

ETHEL H. ANDERSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above case came on regularly for trial on January 28 and 29, 1954, before the Hon. James M. Carter, United States District Judge, sitting without a jury, the plaintiff appearing through her counsel, Mackay, McGregor, Reynolds and Bennion, by Adam Y. Bennion, Esq., and the defendant appearing through its counsel Laughlin E. Waters, United States Attorney for the Southern District of California, and Edward R. McHale, Assistant United States Attorney for said District, Chief, Tax Division, was consolidated for trial with the cases of *H. S. Anderson, Jr. v. United States of America*, No. 12044-C; *Robert W. Anderson v. United States of America*, No. 12046-C; *Gloria S. Anderson v. United States of America*, No. 12047-C; and *John Hardy Anderson v. United States of America*, No. 12048-C; and evidence both oral and documentary having been received and the matter having been submitted on the evidence, written memoranda and oral argument, and the

Court having duly considered the same and on June 30, 1954, having filed its Memorandum of Decision, and having filed its Findings of Fact and Conclusions of Law and ordered that judgment be entered for the defendant in accordance with said Findings and Conclusions;

Now, Therefore, it is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing by her complaint, that the above-entitled action be dismissed with prejudice, and that defendant have judgment for and shall recover from plaintiff the amount of defendant's costs to be taxed by the Clerk of this Court in the sum of \$20.00.

Judgment rendered this 18th day of March, 1955.

/s/ JAMES M. CARTER,

United States District Judge.

Lodged February 1, 1955.

[Endorsed]: Filed March 18, 1955.

Docketed and entered March 22, 1955.

United States District Court for the Southern
District of California, Central Division
No. 12046-C Civil

ROBERT W. ANDERSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above case came on regularly for trial on

January 28 and 29, 1954, before the Hon. James M. Carter, United States District Judge, sitting without a jury, the plaintiff appearing through his counsel, Mackay, McGregor, Reynolds and Bennion, by Adam Y. Bennion, Esq., and the defendant appearing through its counsel Laughlin E. Waters, United States Attorney for the Southern District of California, and Edward R. McHale, Assistant United States Attorney for said District, Chief, Tax Division, was consolidated for trial with the cases of *H. S. Anderson, Jr. v. United States of America*, No. 12044-C; *Ethel H. Anderson v. United States of America*, No. 12045-C; *Gloria S. Anderson v. United States of America*, No. 12047-C; and *John Hardy Anderson v. United States of America*, No. 12048-C; and evidence both oral and documentary having been received and the matter having been submitted on the evidence, written memoranda and oral argument, and the Court having duly considered the same and on June 30, 1954, having filed its Memorandum of Decision, and having filed its Findings of Fact and Conclusions of Law and ordered that judgment be entered for the defendant in accordance with said Findings and Conclusions;

Now, Therefore, it is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing by his complaint, that the above-entitled action be dismissed with prejudice, and that defendant have judgment for and shall recover from plaintiff the amount of

defendant's costs to be taxed by the Clerk of this Court in the sum of \$20.00.

Judgment rendered this 18th day of March, 1955.

/s/ JAMES M. CARTER,

United States District Judge.

Lodged February 1, 1955.

[Endorsed]: Filed March 18, 1955.

Docketed and entered March 22, 1955.

United States District Court for the Southern
District of California, Central Division
No. 12047-C Civil

GLORIA S. ANDERSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above case came on regularly for trial on January 28 and 29, 1954, before the Hon. James M. Carter, United States District Judge, sitting without a jury, the plaintiff appearing through her counsel, Mackay, McGregor, Reynolds and Bennion, by Adam Y. Bennion, Esq., and the defendant appearing through its counsel Laughlin E. Waters, United States Attorney for the Southern District of California, and Edward R. McHale, Assistant

United States Attorney for said District, Chief, Tax Division, was consolidated for trial with the cases of *H. S. Anderson, Jr. v. United States of America*, No. 12044-C; *Ethel H. Anderson v. United States of America*, No. 12045-C; *Robert W. Anderson v. United States of America*, No. 12046-C; and *John Hardy Anderson v. United States of America*, No. 12048-C; and evidence both oral and documentary having been received and the matter having been submitted on the evidence, written memoranda and oral argument, and the Court having duly considered the same and on June 30, 1954, having filed its Memorandum of decision, and having filed its Findings of Fact and Conclusions of Law and ordered that judgment be entered for the defendant in accordance with said Findings and Conclusions;

Now, Therefore, it is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing by her complaint, that the above-entitled action be dismissed with prejudice, and that defendant have judgment for and shall recover from plaintiff the amount of defendant's costs to be taxed by the Clerk of this Court in the sum of \$20.00.

Judgment rendered this 18th day of March, 1955.

/s/ JAMES M. CARTER,

United States District Judge.

Lodged February 1, 1955.

[Endorsed]: Filed March 18, 1955.

Docketed and entered March 22, 1955.

United States District Court for the Southern
District of California, Central Division

No. 12048-C Civil

JOHN HARDY ANDERSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above case came on regularly for trial on January 28 and 29, 1954, before the Hon. James M. Carter, United States District Judge, sitting without a jury, the plaintiff appearing through his counsel, Mackay, McGregor, Reynolds and Bennion, by Adam Y. Bennion, Esq., and the defendant appearing through its counsel Laughlin E. Waters, United States Attorney for the Southern District of California, and Edward R. McHale, Assistant United States Attorney for said District, Chief, Tax Division, was consolidated for trial with the cases of H. S. Anderson, Jr. v. United States of America, No. 12044-C; Ethel H. Anderson v. United States of America, No. 12045-C; Robert W. Anderson v. United States of America, No. 12046-C; and Gloria S. Anderson v. United States of America, No. 12047-C; and evidence both oral and documentary having been received and the matter having been submitted on the evidence, written memoranda and oral argument, and the Court having duly con-

sidered the same and on June 30, 1954, having filed its Memorandum of Decision, and having filed its Findings of Fact and Conclusions of Law and ordered that judgment be entered for the defendant in accordance with said Findings and Conclusions;

Now, Therefore, it is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing by his complaint, that the above-entitled action be dismissed with prejudice, and that defendant have judgment for and shall recover from plaintiff the amount of defendant's costs to be taxed by the Clerk of this Court in the sum of \$20.00.

Judgment rendered this 18th day of March, 1955.

/s/ JAMES M. CARTER,

United States District Judge.

Lodged February 1, 1955.

[Endorsed]: Filed March 18, 1955.

Docketed and entered March 22, 1955.

United States District Court, Southern District
of California, Central Division
Civil Action No. 12044-C

H. S. ANDERSON, JR.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL

To the Defendant, United States of America, Above
Named and to Its Attorneys, Laughlin E.

Waters, United States Attorney; Edward R. McHale, Assistant United States Attorney, 600 Federal Building, Los Angeles 12, California:

You, and Each of You, are Hereby Advised that the plaintiff H. S. Anderson, Jr., does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment in favor of defendant docketed and entered March 22, 1955, in the above-entitled case.

Dated May 19, 1955.

MACKAY, McGREGOR,
REYNOLDS & BENNION,

By /s/ A. CALDER MACKAY,

By /s/ ADAM Y. BENNION,

By /s/ STAFFORD R. GRADY,
Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed May 20, 1955.

United States District Court, Southern District
of California, Central Division

Civil Action No. 12045-C

ETHEL H. ANDERSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL

To the Defendant, United States of America, Above
Named and to Its Attorneys, Laughlin E.
Waters, United States Attorney; Edward R.
McHale, Assistant United States Attorney, 600
Federal Building, Los Angeles 12, California:

You, and Each of You, are Hereby Advised that
the plaintiff, Ethel H. Anderson, does hereby ap-
peal to the United States Court of Appeals for the
Ninth Circuit from the judgment in favor of
defendant docketed and entered March 22, 1955,
in the above-entitled case.

Dated May 19, 1955.

MACKAY, McGREGOR,
REYNOLDS & BENNION,

By /s/ A. CALDER MACKAY,

By /s/ ADAM Y. BENNION,

By /s/ STAFFORD R. GRADY,

Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed May 20, 1955.

United States District Court, Southern District
of California, Central Division
Civil Action No. 12046-C

ROBERT W. ANDERSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL

To the Defendant, United States of America, Above
Named and to Its Attorneys, Laughlin E.
Waters, United States Attorney; Edward R.
McHale, Assistant United States Attorney, 600
Federal Building, Los Angeles 12, California;

You, and Each of You, are Hereby Advised that
the plaintiff, Robert W. Anderson, does hereby ap-
peal to the United States Court of Appeals for the
Ninth Circuit from the judgment in favor of de-
fendant docketed and entered March 22, 1955, in
the above-entitled case.

Dated May 19, 1955.

MACKAY, McGREGOR,

REYNOLDS & BENNION,

By /s/ A. CALDER MACKAY,

By /s/ ADAM Y. BENNION,

By /s/ STAFFORD R. GRADY,

Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed May 20, 1955.

United States District Court, Southern District
of California, Central Division
Civil Action No. 12047-C

GLORIA S. ANDERSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL

To the Defendant, United States of America, Above
Named and to Its Attorneys, Laughlin E.

Waters, United States Attorney; Edward R.
McHale, Assistant United States Attorney, 600
Federal Building, Los Angeles 12, California:

You, and Each of You, are Hereby Advised that
the plaintiff, Gloria S. Anderson, does hereby ap-
peal to the United States Court of Appeals for the
Ninth Circuit from the judgment in favor of de-
fendant docketed and entered March 22, 1955, in
the above-entitled case.

Dated May 19, 1955.

MACKAY, McGREGOR,
REYNOLDS & BENNION,

By /s/ A. CALDER MACKAY,

By /s/ ADAM Y. BENNION,

By /s/ STAFFORD R. GRADY,
Attorneys for Plaintiff.

· Acknowledgment of Service attached.

[Endorsed]: Filed May 20, 1955.

United States District Court, Southern District
of California, Central Division
Civil Action No. 12048-C

JOHN H. ANDERSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

NOTICE OF APPEAL

To the Defendant, United States of America, Above
Named and to Its Attorneys, Laughlin E.
Waters, United States Attorney; Edward R.
McHale, Assistant United States Attorney, 600
Federal Building, Los Angeles 12, California:

You, and Each of You, are Hereby Advised that
the plaintiff, John H. Anderson, does hereby ap-
peal to the United States Court of Appeals for the
Ninth Circuit from the judgment in favor of de-
fendant docketed and entered March 22, 1955, in
the above-entitled case.

Dated May 19, 1955.

MACKAY, McGREGOR,

REYNOLDS & BENNION,

By /s/ A. CALDER MACKAY,

By /s/ ADAM Y. BENNION,

By /s/ STAFFORD R. GRADY,

Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed May 20, 1955.

In the United States District Court, Southern
District of California, Central Division

Nos. 12044-C, 12045-C, 12046-C, 12047-C
and 12048-C

H. S. ANDERSON, JR.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

And Related Cases.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Thursday, January 28, 1954

Appearances:

For the Plaintiffs:

MACKAY, MCGREGOR, REYNOLDS &
BENNION, By

ADAM BENNION, ESQ., and
A. CALDER MACKAY, ESQ.

For the Defendant:

LAUGHLIN E. WATERS,
United States Attorney; By

EDWARD R. McHALE,
Assistant United States Attorney.

Thursday, January 28, 1954, 10:00 A.M.

(Other court matters.)

The Court: Let me take a recess in this next case and read over your stipulation of facts and go on from there.

Mr. McHale: Before your Honor takes a recess, can I present my supplemental trial memorandum?

The Court: Yes.

This is Anderson v. United States, Mr. Reporter, Nos. 12044 to 12048, inclusive.

Mr. McHale: May the record show that I also served Mr. Bennion with a copy.

The Court: How long do you think it will take to try this case?

Mr. Bennion: Your Honor, I think we can finish today. That is my feeling.

Mr. McHale: I think Mr. Bennion is right on that, your Honor. I think most of the case is going to depend upon the documents.

Mr. Bennion: I would say that we have probably 20 exhibits which we have agreed to put in. If I could just put them in when we start and explain what they are, I think we can get them all in without much delay in time.

The Court: They are going in practically by stipulation, aren't they? [3*]

Mr. McHale: I think all but one, your Honor.

The Court: Why don't you, meanwhile, before you call me back out here, mark all your exhibits with the clerk, the plaintiff using the number series. And, Mr. McHale, do you have some exhibits?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. McHale: I may have some later in the trial, but these we have agreed upon.

The Court: All right.

The Clerk: Give them to me in the order in which you want them marked.

(A recess was taken.)

The Clerk: Your Honor, during the recess I have marked the following exhibits for identification: Plaintiff's Exhibits 1 to 17, inclusive; and Defendant's Exhibit A.

The Court: All right.

(The documents referred to were marked Plaintiff's Exhibits 1 to 17, inclusive; and Defendant's Exhibit A, for identification.)

Mr. Bennion: May it please the court, this is a suit for income tax refund, as a matter of fact, five suits by five related taxpayers, but the same issue is involved in each of the five cases and they have heretofore been consolidated. Fundamentally, the issue grows out of the disallowance by the Commissioner of certain deductions taken by these five taxpayers in both the years of '42 and '43, growing out of payments [4] made to or for the estate of Harold S. Anderson, Sr., who died in December, 1941.

The cause of action we have here grows out of the proper treatment to be accorded those payments. At the time he died—I may say, your Honor, that the parties here have agreed upon a rather short stipulation of facts——

The Court: I just got through reading it.

Mr. Bennion (Continuing): —consisting of about four pages, which I should like to offer at this time if they are not already deemed in evidence.

The Court: The pretrial stipulation of facts will be received in evidence as part of the record of the case.

Mr. Bennion: Thank you, your Honor.

Now, in line with that stipulation, Mr. Anderson, Sr., at the time he died in 1941, was a member of two partnerships; one with Harold S. Anderson, Jr., which we have called the California partnership, and in which the decedent owned 75 per cent interest and Harold S. Jr., owned the remaining 25 per cent interest; and the other partnership was referred to by us as the Alaska partnership, in which not only the decedent but his three sons were members.

After he died an agreement was drawn up, after rather protracted negotiations, nearly a year later in 1942 an agreement was entered into under which Harold S. Anderson, Jr., as the surviving partner of the California partnership agreed to [5] pay the estate of the decedent \$75,000, representing the agreed fair market value at the date of death of whatever interest the decedent or his estate had in the California partnership. And the agreement contained similar provisions regarding the Alaska partnership. That is, the three surviving partners, the three sons, agreed to pay to the estate the sum of \$50,000, representing the agreed fair market

value of the decedent's interest or the estate's interest in the Alaska partnership or business.

Now, the evidence will show, if your Honor please, that the business in the meantime, prior to the execution of this agreement, had been carried on by the surviving partners, and at or about the time this agreement was entered into the three brothers entered into two new limited partnership agreements in which the wives of the two who at that time were married were also partners, they were the limited partners, for the purpose of carrying on the respective businesses in the future.

And I may say that the evidence will show that that arrangement was one which had been agreed upon shortly after the decedent died in December of 1941.

We have agreed in our pretrial stipulation that various documents may be admitted in evidence, and the clerk, I understand, has marked them for identification. I would like at this time, if your Honor please, to move that they be received in evidence in line with our stipulation. [6]

The Court: Any objection?

Mr. McHale: Just with respect to No. 16, your Honor. We have a corrected balance sheet which I have handed the clerk, which we would like to go in in place of the one that Mr. Bennion has prepared. It shows on the left the same—there are two columns, there is the column that Mr. Bennion shows and there is another column which shows corrections per revenue agent's report.

The Court: Are you using the exhibit numbers as you have set forth in your stipulation?

Mr. Bennion: Yes, your Honor.

The Court: So now we are talking about paragraph 8 of the stipulation. There there is a reference to Exhibits 16 and 17, but this matter we are discussing now concerns only 16, is that right?

Mr. Bennion: That is correct.

I may say for the court's information Exhibit 16 as offered by the plaintiff is a copy of the balance sheet as it existed on December 31, 1941, which was four days after the death of the decedent.

The exhibit which I understand Mr. McHale would like to offer also is one which was prepared by a revenue agent, and it was first submitted to the taxpayers on December 30, 1942, more than a year later, and after our transaction had already occurred. [7]

The principal difference between the two, I may say, is that the agent came in and set up certain equipment on the balance sheet which had been charged to expense on the books, so he increased the net assets by about \$47,000, due to this equipment, and made the determination that the equipment should be written off over a two-year life, 1942 and 1943.

We take the position that the arbitrary determination, after our events took place, is wholly immaterial and does not affect what these five plaintiffs' purchased.

The Court: Is there any reason why we can't have both exhibits in evidence with a proper statement identifying what they are?

Mr. McHale: I think not, your Honor, if you

will accept both of them, so that we are not bound by 16 and he is not bound by A.

The Court: Is that satisfactory?

Mr. Bennion: We do not disagree that the agent came in and did that, but we——

The Court: In other words, so that the record will show what we are talking about, Exhibit 16 for identification is offered by the plaintiff, and it is the balance sheet that plaintiff contends represented a true statement of the assets and liabilities as of December 31st, '41 for H. S. Anderson Company, the California partnership—is that right?

Mr. Bennion: That is correct, according to the books. [8]

The Court: And it is your contention with reference to that that your later transactions, including the settlement with the estate of the widow, were made partly on the basis of this balance sheet?

Mr. Bennion: That is correct.

The Court: Now the Government has Exhibit A which they propose to offer, which the Government contends is a Treasury auditor's analysis of what the assets and liabilities were as of that date?

Mr. McHale: Yes.

Mr. Bennion: We have no objection, with the understanding that that was made after our settlement agreement was entered into.

The Court: Is it stipulated that this was made at a date after December 11, 1942, which was the date of the settlement agreement, Exhibit 2?

Mr. McHale: Yes.

The Court: All right. Then Exhibits 1 to 17 are

received into evidence, including Exhibit 16, of course; and Defendant's Exhibit A is received into evidence.

(The documents, marked Plaintiff's Exhibits 1 to 17, inclusive, and Defendant's Exhibit A, for identification, were received in evidence.)

PLAINTIFF'S EXHIBIT No. 2

Agreement

This Agreement, made and entered into this 11th day of December, 1942, at Los Angeles, California, by and between Orien H. Anderson, hereinafter called "Mrs. Anderson"; H. S. Anderson, Jr., Administrator of the Estate of H. S. Anderson, deceased, hereinafter called "Administrator"; H. S. Anderson, Jr., Robert W. Anderson, and John Hardy Anderson, hereinafter called "Anderson's Sons"; and Orien H. Anderson, as Guardian of the person and estate of William Todd Anderson, a minor, hereinafter called "Guardian," all of the County of Los Angeles, State of California.

Witnesseth:

The parties hereto hereby make the following declarations and admissions:

A. That H. S. Anderson died intestate in the County of Los Angeles, State of California, on the 27th day of December, 1941, leaving as his heirs, Mrs. Anderson, who is his widow, his three adult sons referred to as Anderson's Sons, and his son

Plaintiff's Exhibit No. 2—(Continued)

William Todd Anderson, a minor. These four sons being his only children.

B. That on the 19th day of February, 1942, in a proceeding entitled "In the Matter of the Estate of H. S. Anderson, deceased, etc., No. 210-180, in the Superior Court of the State of California, in and for the County of Los Angeles," Administrator was appointed administrator of the Estate of H. S. Anderson, deceased, and ever since that date has been, and now is the duly appointed, qualified and acting Administrator of said estate.

C. That on the 9th day of February, 1942, in the matter entitled "In the Matter of the Guardianship of the Person and Estate of William Todd Anderson, A Minor, No. 211354, in the Superior Court of the State of California, in and for the County of Los Angeles," Guardian was appointed Guardian of the person and estate of said Minor.

D. It is the purpose and intention of the parties hereto by this agreement to settle certain controversies and differences which have heretofore existed between them relative to the extent and character of the Estate of H. S. Anderson, deceased, to provide money for the payment of the obligations of said estate and to expedite the distribution of said estate to the heirs of said deceased as herein provided.

Now, Therefore, for valuable consideration received by each of the parties hereto and the further consideration of the promises and agreements by

Plaintiff's Exhibit No. 2—(Continued)

each of the parties hereto to be performed, it is agreed as follows:

1. This agreement and all of the declarations, admissions and undertakings hereof shall be conditioned upon (1) the approval thereof as to the undertakings and agreements of Administrator by the Superior Court of the State of California in and for the County of Los Angeles, and (2) the approval thereof as to the undertakings and agreements of Guardian, as guardian of the person and estate of William Todd Anderson, a minor, by the Superior Court of the State of California, in and for the County of Los Angeles. In the event the said Court shall not make and enter its orders approving the said agreement of said Administrator and Guardian as above, then this instrument shall be null and void and none of the parties hereto shall be bound by any of the declarations, admissions, covenants, agreements or undertakings hereof.

2. Prior to and at the time of the death of H. S. Anderson, deceased, on December 27, 1941, he was a member of a copartnership consisting of himself and his son, H. S. Anderson, Jr., in which H. S. Anderson, deceased, owned a 75% interest, and H. S. Anderson, Jr., a 25% interest of said copartnership. The business of said copartnership consisted of all of the enterprises then carried on and now being carried on in the States of California and Nevada. Prior to and at the time of the

Plaintiff's Exhibit No. 2—(Continued)

death of H. S. Anderson, deceased, the business of said copartnership was conducted under the name of "H. S. Anderson"; and subsequent to the death of H. S. Anderson, deceased, said business has been conducted in part under the name of "Anderson Bros. Supply Co. of Nevada." The said copartnership will herein be referred to as "The California Partnership."

3. Prior to and at the time of the death of H. S. Anderson, deceased, he was a member of a copartnership consisting of himself and Anderson's Sons, in which H. S. Anderson, deceased, owned a 40% interest, Robert W. Anderson owned a 30% interest, John Hardy Anderson owned a 20% interest, and H. S. Anderson, Jr., owned a 10% interest. The business of the said copartnership consisted of all of the enterprises then carried on and now being carried on in the Territory of Alaska. The business of said copartnership has been and now is being carried on under the name of Anderson Bros. Supply Co. of Alaska. The said copartnership will hereinafter be referred to as the Alaska Partnership.

4. Prior to and at the time of the death of H. S. Anderson, deceased, he was a member of a copartnership consisting of himself and W. D. Anderson, in which H. S. Anderson, deceased, owned a 50% interest and W. D. Anderson owned a 50% interest. The business of the said copartnership has been and now is being carried on under the name of Anderson Bros. Supply Co. of Texas. The said co-

Plaintiff's Exhibit No. 2—(Continued)

partnership will hereinafter be referred to as "The Texas Partnership."

5. The parties hereto have investigated and it is agreed that the interest of H. S. Anderson, deceased, at the time of his death, in the foregoing partnerships and his other property was as follows:

(a) In the California Partnership, a 75% interest, which interest was the separate property of H. S. Anderson, deceased;

(b) In The Alaska Partnership, a 40% interest thereof, which interest was the community property of H. S. Anderson, deceased, and Mrs. Anderson;

(c) In The Texas Partnership, a 50% interest thereof, which interest was the community property of H. S. Anderson, deceased, and Mrs. Anderson;

(d) That all other property of H. S. Anderson, deceased, was his separate property (except only the proceeds of the policies of insurance on his life hereinafter more particularly referred to).

6. H. S. Anderson, Jr., as surviving partner of The California Partnership, in full satisfaction and discharge of all claims of the estate of H. S. Anderson, deceased, and of the heirs of H. S. Anderson, deceased, for and on account of the interest of said H. S. Anderson in his lifetime and that his estate has acquired since his death in and to the California Partnership, hereby agrees to pay into the estate of H. S. Anderson, deceased the following sums of money:

(a) The sum of \$75,000.00, representing, as the

Plaintiff's Exhibit No. 2—(Continued)

parties hereto agree, the fair market value at date of the death of the decedent, of his interest in said California Partnership;

(b) The sum of \$228,369.32, representing, as the parties hereto agree, the estate's share of the profits of The California Partnership from date of the death of the decedent, December 27, 1941, to the date of this agreement.

It is further agreed that said Administrator shall apply to the Superior Court of the State of California in and for the County of Los Angeles, in the Matter of said estate, for its order authorizing the acceptance of said sums by him as such Administrator in full consideration and discharge of said surviving partner and said payments shall be made by said surviving partner to said Administrator forthwith upon the entry of the said order approving and confirming the same.

7. The Administrator shall apply to the Superior Court of the State of California, in and for the County of Los Angeles for its order, and the other parties hereto hereby consent that the entire sum of \$228,369.32 (representing the estate's share of the profits as heretofore agreed), received by the Administrator on account of said claim against the surviving partner of The California Partnership, forthwith and prior to December 26, 1942, to distribute and the same shall be distributed to the heirs at law of said H. S. Anderson, deceased, as separate property of said decedent, that is to say, one-third ($\frac{1}{3}$) thereof to Mrs. Anderson and one-

Plaintiff's Exhibit No. 2—(Continued)

sixth ($\frac{1}{6}$) thereof to each of Anderson's Sons and the Minor Son. It is further agreed that each distributee thereof shall pay his or her own respective income taxes thereon.

8. H. S. Anderson, Jr., Robert W. Anderson, and John Hardy Anderson, as surviving partners of The Alaska Partnership, in full satisfaction and discharge of all claims of the estate of H. S. Anderson, deceased, and of the heirs of H. S. Anderson, deceased, for and on account of the interest of H. S. Anderson in his lifetime and that his estate has acquired since his death in and to The Alaska Partnership, hereby agree to pay into the estate of H. S. Anderson, deceased, the following sums of money:

(a) The sum of \$50,000.00, representing, as the parties hereto agree, the fair market value at date of death of the decedent of his interest in said Alaska Partnership;

(b) The sum of \$38,000.00, representing, as the parties hereto agree, the estate's share of the profits of The Alaska Partnership from date of the death of the decedent, December 27, 1941, to the date of this agreement.

It is further agreed that said Administrator shall apply to the Superior Court of the State of California, in and for the County of Los Angeles, in the matter of said estate, for its order authorizing the acceptance of said sums by him as such Administrator in full consideration and discharge of said surviving partners and said payments shall be made

Plaintiff's Exhibit No. 2—(Continued)

by said surviving partners to said Administrator forthwith upon the entry of the said order approving and confirming the same.

9. It is agreed that the fair market value at date of death of the estate's interest in The Texas Partnership was the sum of \$500.00, and that Mrs. Anderson will pay the estate this amount for all of the estate's claim in and to said Texas Partnership; it is further agreed that the estate's interest in the profits of The Texas Partnership from date of death to the date of this agreement is \$19,000.00, which sum is to be paid into the estate immediately by Anderson's Sons.

10. It is understood and agreed that in addition to its interest in the said copartnerships, the estate owns the residential property described as follows, which is separate property:

Lot 4, Block 4, Trace 9745, in the County of Los Angeles, State of California, as per map recorded in Book 141, Pages 93-96, of Maps, in the Office of the County Recorder of said County.

and that said property is inventoried and appraised, together with furnishings, at the sum of \$45,000.00. It is understood and agreed that Anderson's Sons will, within 90 days from date hereof, purchase said property from said estate, and the estate shall sell the same to Anderson's Sons, for the total sum of \$45,000.00, which will be paid into the estate when the sale is approved by the Court.

Plaintiff's Exhibit No. 2—(Continued)

11. It is recognized and agreed by all of the parties hereto that at the date of death of decedent, The California Partnership was obligated for advances made by H. S. Anderson, deceased, in the amount of \$29,013.36.

It is further understood and agreed that the said sum of \$29,013.36, owed to the decedent at the date of his death by The California Partnership was community property and that the same shall be paid into the estate by the surviving partner, H. S. Anderson, Jr.

12. It is agreed that out of and from the moneys paid into said estate, exclusive of the said sum of \$228,369.32, as above specified, there shall be paid all of the costs of administration, attorneys' fees, claims, taxes, and advances made to the estate, and the balance thereof shall be distributed; all such payments and distributions to be made in accordance with Schedule "1" attached hereto and made a part hereof, such distribution to be made on or before June 30, 1943.

13. It is agreed by all the parties hereto that Mrs. Anderson shall be paid from the estate of H. S. Anderson, deceased, a total family allowance of \$25,000.00. Mrs. Anderson agrees that she has heretofore received payment of \$13,000.00 thereof, and there remains a balance of \$12,000.00, which shall be paid to her on or before April 1, 1943.

14. It is agreed that all the parties hereto will make, join in and/or approve all applications, peti-

Plaintiff's Exhibit No. 2—(Continued)

tions and instruments of every kind or character to the probate Court, or otherwise, proper, convenient or necessary for distribution to the various parties hereto in accordance with the terms hereof and of Schedule "1" which is attached hereto, and in all respects to effectuate the terms and provisions of this agreement.

15. (a) It is understood and agreed that the insurance premiums paid by decedent during marriage of himself and Orien Anderson on the policies of insurance totaling \$175,000.00, payable to Anderson's Sons, were paid out of separate property and no part of said policies or the proceeds therefrom constitute community property.

(b) It is also understood and agreed that the insurance premiums paid by decedent on the policy of insurance totaling \$50,000.00, payable to Todd Anderson, were paid out of separate property and no part of said policy or the proceeds therefrom constitutes community property.

(c) It is understood and agreed that the premiums paid by the decedent on the policy of insurance totaling \$75,000.00, payable to Orien Anderson, were paid out of community funds and that no part of said policy or the proceeds therefrom constitutes separate property.

(d) It is also understood and agreed that the premiums paid by decedent on the annuity policy of \$42,478.23, wherein H. S. Anderson, Jr., and Orien Anderson are equal beneficiaries, were paid partly out of separate and partly out of community funds;

Plaintiff's Exhibit No. 2—(Continued)

and that the sum of \$23,452.92 derived or to be derived from said policy constitutes community property and the sum of \$19,025.31 constitutes separate property.

16. All of the parties hereto, as to all matters herein, waive the provisions of Section 583 of the Probate Code restricting the right of the Administrator to purchase property of the estate, and expressly consent that the sales may be made by the Administrator of the estate to himself as in this contract provided for, and hereby ratify and approve such sales.

17. All the parties hereto agree that the real property and the improvements thereon, said real property being described as follows:

Lots 65 and 66, in the Industrial Center Tract, in the County of Los Angeles, State of California, as per map recorded in Book 12, Page 101, of Maps, in the office of the County Recorder of said County.

and also the shares of stock of Douglas Oil & Refining Corporation, although in the record name of H. S. Anderson, are in reality the property of The California Partnership, and all parties hereto will join in such proceedings as may be proper, convenient or necessary to effectuate quieting title to that effect.

18. All of the parties hereto have had access to all of the books and records of the various copartnerships by their accountants and attorneys, and

Plaintiff's Exhibit No. 2—(Continued)

this agreement is entered into freely and voluntarily, based upon an examination of said books and records, and is not induced by any representation of any of the parties to the other.

19. Anything in this agreement to the contrary notwithstanding, it is understood and agreed that this agreement shall not become effective unless the Court approves this contract in every respect and issues its order distributing to the heirs on or before December 26, 1942, the said sum of \$228,369.32.

20. The distribution of the profits of \$228,369.32 hereinabove referred to shall be made in the year 1942, and distribution herein provided to be made other than the distribution in 1942 of said profits shall be made to the heirs on or before June 30, 1943.

21. It is understood and agreed that Anderson's Sons will pay and discharge any and all liabilities of the estate of H. S. Anderson, deceased, in addition to those set forth in Schedule "1," and that they will pay, and hold and save harmless Mrs. Anderson and the Minor Son from, any and all such additional liabilities which they may be liable for as the result of having received the distributions from the estate as herein agreed upon.

It is further understood and agreed that Anderson's Sons will pay and discharge any and all liabilities for additional income taxes assessed against Mrs. Anderson and the heirs prior to 1942, and for

Plaintiff's Exhibit No. 2—(Continued)

any additional income taxes for 1943 over and above those set forth in Schedule "1."

To secure the liabilities herein assumed, the said Anderson's Sons will make, execute and deliver a good and sufficient first trust deed upon the residence property being purchased by them in accordance with paragraph 10 hereof. In the event that some higher bidder purchases said property from the estate, they will increase the amount of the surety bond hereinafter referred to from \$30,000.00 to \$50,000.00. Said first trust deed shall provide that Anderson's Sons shall have the right to sell said house free and clear of said deed of trust, provided that in the event of such sale the surety bond hereinafter referred to shall be increased from \$30,000.00 to \$50,000.00.

It is agreed that as further security said Anderson's Sons will procure and deliver to Mrs. Anderson and the Minor Son the surety bond written by a company authorized to issue Court surety bonds in Los Angeles County, which said surety bond by its terms shall secure the full payment of any liabilities referred to in this paragraph and shall be in the amount of \$30,000.00.

22. In addition to the property set forth in paragraph 17 hereof, there is also a certain oil lease in Ventura County and certain Puett Starting Gate Company stock which is in the name of H. S. Anderson, deceased, but which is the property of the California copartnership and which is to be handled as provided for in said paragraph 17.

Plaintiff's Exhibit No. 2—(Continued)

In Witness Whereof, the parties hereto have executed this agreement the day and year first hereinabove written.

/s/ ORIEN H. ANDERSON.

/s/ H. S. ANDERSON, JR.,
Administrator of the Estate of
H. S. Anderson, Deceased.

/s/ H. S. ANDERSON, JR.,

/s/ ROBERT W. ANDERSON.

JOHN HARDY ANDERSON,

By /s/ CYNTHIA BEAL,
His Attorney-in-Fact.

/s/ ORIEN H. ANDERSON,
As Guardian of the Person and Estate of William
Todd Anderson, a Minor.

Admitted in evidence January 28, 1954.

PLAINTIFF'S EXHIBIT No. 16

H. S. Anderson Co.

Balance Sheet

As of December 31, 1941

Assets:

Cash	\$ 18,832.62	
Accounts receivable	29,622.99	
Anderson Brothers Supply Co. of California	1,101.39	
Anderson Brothers Supply Co. of Nevada	14,940.55	
Inventory	51,187.82	
Investment—		
Puett Elect. Starting Gate	2,000.00	
Real Estate—1281 E. 6th	5,071.70	
Douglas Oil Co.—stock	5,000.00	
U. S. Defense Bonds	7,500.00	
Equipment	24,088.30	
Office	8.34	
Douglas & Cal Ship	8,928.47	
Prepaid expense	862.55	
Due from:		
Orien Anderson	1,000.00	
Estate of H. S. Anderson	1,788.61	
H. S. Anderson, Jr.	3,083.99	
Total Assets	\$137,352.09	
Less Depreciation Reserve	21,665.94	\$115,686.15

Liabilities:

Accounts payable	\$ 5,216.87	
Notes payable	34,163.18	
Script	1,691.50	
H. S. Anderson	29,013.26	
J. H. Anderson	18,663.23	
R. W. Anderson	26,938.11	
Total Liabilities		\$115,686.15
Net Worth		None

Admitted in evidence January 28, 1954.

PLAINTIFF'S EXHIBIT No. 17

Anderson Bros., Supply Co., of Alaska

Balance Sheet

As of December 31, 1941

Assets:

Cash	\$ 2,824.15
Accounts receivable	20,200.36
Inventory	29,130.37
Prepaid items	1,743.75
Claims pending	1,091.59
Equipment	57,873.09
Buildings	18,125.45
H. S. Anderson, Inc.	3,008.00

Total Assets	\$128,348.46
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Liabilities:

Accounts payable	\$ 360.00
Trade books	354.35
Bad debt reserve	1,289.81
Depreciation reserve	27,747.56

Capital:

H. S. Anderson	39,438.70
H. S. Anderson, Jr.	9,859.67
J. H. Anderson	19,719.35
R. W. Anderson	29,579.02

Total	\$128,348.46
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Admitted in evidence January 28, 1954.

H. S. Anderson Co.
Balance Sheet
as at 12/31/47

129

	Books	dr	cr.	Corrected
Accounts receivable	< 1883262 >			< 1883262 >
Co. of Calif.	2962299			2962299
Co. of Nebraska	110139	2531515	2519849	121825
along	1494055			1494055
	5118782			5118782
United Fruit Elect. Station Note	7000 00			7000 00
Real Estate - 128186 1/2	507170			507170
Andersons Oil Co. stock	5000 00			5000 00
U.S. Refuse Bonds	7500 00			7500 00
Debt	2408830	1032856		1273168
	834			834
Car & Coal ship	892847			892847
aid expenses	86255			86255
and cost of acquisition	1000 00			1000 00
Total	13747949			22582471
Accounts payable	521687			521687
payable	3416318			3416318
due	167150			167150
to H. S. Anderson	2901326	2519849	6778704	7161181
- Estate of H. S. Anderson	< 1788617 >			< 1788617 >
- H. S. Anderson Jr.	< 3083997 >		488574	150175
- J. H. Anderson	1866323			1866323
- R. W. Anderson	2693811			2693811
creation reserve	2166594		5587093	7753687
Total	13247949	15234770	15374770	22582471

To adjust books to return & R.A.R. in accordance
with R.A.R. dated 12/30/47

VS.

EXHIBIT 1

Date No IDENTIFICATION

Date No IN EVIDENCE

Clerk, U. S. District Court, Sou. Dist. of Calif.

Deputy Clerk



Mr. McHale: I don't know whether the clerk has exhibits 18 and 19. [9]

The Clerk: No, I do not.

Mr. McHale: We didn't have sufficient copies made of this.

You don't have an extra one, do you?

Mr. Bennion: No, I don't have an extra copy of those two.

Mr. McHale: These are the only copies that I have, if they may be introduced and withdrawn for the purpose of substituting photostats at some future time.

The Court: You may withdraw them at a later time to substitute photostats.

Is this 18 and 19 referred to in the stipulation?

Mr. McHale: Yes.

The Court: 18 and 19 received in evidence.

(The documents referred to were marked Plaintiff's Exhibits 18 and 19, and were received in evidence.)

Mr. Bennion: Your Honor, there are two other exhibits which the plaintiffs would like to offer, which are not designated in the stipulation. As No. 20, a petition for approval of the contract of December 11, 1942.

The Court: Petition to the Probate Court?

Mr. Bennion: Yes, your Honor.

The Court: Received into evidence as Exhibit 20. [10]

(The document referred to was marked Plaintiff's Exhibit 20 and was received in evidence.)

Mr. Bennion: And as the next exhibit, a copy of the order of the Probate Court approving the contract.

The Court: Exhibit 21 received in evidence. Order approving contract of December 11, 1942.

(The document referred to was marked Plaintiff's Exhibit 21, and was received in evidence.)

Mr. Bennion: If your Honor please, perhaps it would help if I just briefly indicated what we regard as the significance of these various documents.

The Court: All right.

Can I have them in front of me as you go ahead?

Mr. Bennion: The first exhibit is a copy of the written partnership agreement of the Alaska partnership, which existed prior to the date of the decedent's death. I think the only significance of that from our standpoint is that it contains no provision for the continuance of the partnership after the death of a partner.

The Court: You say it contains no provision?

Mr. Bennion: Contains no provision.

The Court: And your pretrial stipulation provided that the oral partnership agreement for the California partnership had, likewise, no provision for continuance after date of death? [11]

Mr. Bennion: That is correct, your Honor.

The Court: All right.

Mr. Bennion: Exhibit 2, your Honor, is the agreement of December 11, 1942, in which the parties agreed regarding the interests in these partner-

ships and the value of the decedent's interest in each, and it contains the obligations to purchase or make these payments into the estate.

I should like to call your Honor's attention particularly to paragraph 11 of Exhibit 2 on page 7, where it is stated that the California partnership at the date of the death of the decedent was obligated for the advances made by the deceased in the amount of \$29,013.36.

It goes on to provide, "that the same shall be paid into the estate by the surviving partner, H. S. Anderson, Jr."

If your Honor will refer to Exhibit 16 and Exhibit A, on Exhibit 16 that item of \$29,012.36 is shown as a liability in accordance with this contract, because the sum of that liability was paid into the estate in addition to this \$75,000.

The Court: Let me see this just a minute.

(Slight delay in proceedings.)

The Court: That is the item which is referred to under assets as an account receivable in 16?

Mr. Bennion: No. It is under liabilities, your Honor. The fourth liability, H. S. Anderson, \$29,013.26.

The Court: And it appears, also, does it, in Government's [12] Exhibit A?

Mr. Bennion: In Exhibit A, your Honor, that is one of the things we complain about in Defendant's Exhibit A, the fact that the item of—if your Honor will notice about in the middle of the page of Exhibit A, "Capital—H. S. Anderson \$29,-

013.26," in the first column would appear to be capital rather than a liability.

I call that to the court's attention because under this agreement the twenty-nine thousand was treated as a liability and was repaid to the estate, in addition to which \$75,000 was paid to the estate.

The Court: All right.

Mr. Bennion: Exhibits 3, 4, 5, and 6 are the new limited partnership agreements between the two plaintiffs.

Let me take up, for example, Exhibit 3, which is the limited partnership forming the new partnership to carry on the business in California and Nevada. Now, the five partners had varying interests in that partnership and contributed varying sums of capital to carry on the partnership. On the same day there was entered into, which was December 23, 1942, the five plaintiffs entered into a contemporaneous agreement, which is Exhibit 5, which refers to the coincidental execution of a limited partnership agreement, and goes on to provide various provisions, which we think are immaterial here, except that the very last paragraph of [13] Exhibit 5, on page 3, is to this effect:

"It is agreed that this partnership shall and it hereby does agree to carry on the business of and to assume all of the contracts, debts, and obligations of the former partnerships known as H. S. Anderson, H. S. Anderson Co., and Anderson Brothers Supply Company of Nevada."

Now, the significance of that, your Honor, is that under that language these five partners stepped in and paid this \$75,000 to the estate, and it was so charged on their capital accounts in this new partnership.

That is to answer the Government's point that only H. S. Anderson, Jr., had this obligation. In other words, it was expressly assumed by these various five plaintiffs, and paid by them in their relative proportions in the new partnership.

The Court: Now, that \$75,000 was provided for in the agreement of 12/10——

Mr. Bennion: 12/11——

The Court: '42?

Mr. Bennion: That is correct.

The Court: And that agreement was signed by them as individuals?

Mr. Bennion: That is correct.

The Court: So they incurred an obligation, did they not, as individuals when they signed the agreement of 12/11/42? [14]

Mr. Bennion: The agreement of 12/11/42 reads that H. S. Anderson, Jr., as a surviving partner agrees to pay \$75,000.

There is no obligation there on the part of the other four plaintiffs.

Now, in connection with the Alaska partnership the agreement of 12/11/42 reads that the three surviving sons agree to pay in \$50,000. So that in that agreement there was no obligation on the part of the two wives with respect to either partnership, nor was there an obligation with respect to two of

the sons in connection with the California partnership; but the evidence will show that it was their intent to carry on this business the way they, in fact, did carry it on, and that under this agreement, Exhibit 5, they each assumed their pro rata portion of the obligations which had been created by that contract of December 11, '42.

The Court: Does the Government contest that position?

Mr. McHale: I think as a matter of law that H. S. Anderson, Jr., became fully obligated, as a surviving partner he paid \$75,000 for his deceased father's interest in the firm and he ends up as the sole proprietor. Then what is the later arrangement? Later he brings his brothers and wife and sister-in-law into the partnership. But H. S. Anderson, Jr., at the execution of this agreement with the estate and the three brothers on the Alaska partnership acquire all the assets. What later arrangements they make, that is a capital [15] contribution of the others to get in the partnership, and they acquire interests in the partnerships. That is the Government's contention. And those capital interests are capital interests and not interests in any particular assets.

The Court: Exhibit 3 forming the H. S. Anderson Company partnership, although it states the percentage in which the general partners will share, it does not state their contributions to the partnership, does it?

Mr. Bennion: I have forgotten, your Honor, whether it is that agreement or the contemporane-

ous one, Exhibit 5, in which they agree to contribute. I can't put my finger on that right now, your Honor, but the purpose and the way it was actually handled on the books was that they each contributed whatever assets there were in the business, and were charged in these proportions with their share of the assets so contributed.

The Court: The only thought that goes through my mind is that makes sense as to H. S. Anderson, but Robert Anderson had had no interest in the California partnership prior to the death of his father—is that right?

Mr. Bennion: That is correct. He had certain—what actually happened, your Honor, is that the profits of the Alaska partnership had been in effect brought down and loaned to the California partnership for working capital, and so each of these other three, John and Bob, were each creditors [16] of the California partnership. So they had, if your Honor will look at Exhibit A—the agent set up a capital account there of John Anderson \$18,663.23, and for Robert \$26,938.11. Actually those amounts were treated on the books and between the parties as advances by these two boys to the California partnership, for which the California partnership was obligated. When the new partnership started they just merely continued the business, the old, and the partnership accounts were all charged and credited so that each partner in effect contributed the amount of capital which the agreement called for.

The Court: But John didn't go into this new California partnership, did he?

Mr. Bennion: Yes, he went in to the extent of a one-third interest, on Exhibit 3.

The Court: Oh, yes. It wasn't exactly a one-third interest. It is shown on page 3 of Exhibit 3.

Mr. Bennion: Excuse me. It is a one-quarter interest.

Mr. McHale: A one-quarter interest.

The Court: All right. Go ahead.

Mr. Bennion: Exhibits 7 and 8, if your Honor please——

The Court: First, 4 and 6 are similar agreements, are they? Or are you going to take them up later?

Mr. Bennion: No, I neglected to state those are similar with respect to the Alaska operations, with respect to 3 and 5 [17] that we have discussed regarding California.

The Court: All right.

Mr. Bennion: Now, Exhibits 7 and 8 are the documents whereby these two new limited partnerships created at the end of 1942 were dissolved and canceled as of the close of business on December 31, 1943, by mutual consent and agreement.

Those documents, as they indicate, were actually dated June 30th, 1944.

Now, in our stipulation, your Honor, beginning at the top of page 3 in paragraph 6, we have listed——

The Court: And as to Exhibit 7 and Exhibit 8, although these are only typewritten copies, it is

stipulated they may be used in lieu of the originals?

Mr. McHale: Yes, your Honor.

The Court: Now what were you saying, counsel?

Mr. Bennion: Let me correct my statement.

At the bottom of page 2 of the stipulation in paragraph 5 we stipulate that the only activity of the Alaska partnership on the date of death was in connection with the construction of the air base at Anchorage, Alaska, pursuant to a contract dated July 24, 1940, and a copy of that contract is Exhibit 9.

That is the basic contract under which the Alaska partnership operated for a year and a half preceding the death of the decedent and for a little over two years after. [18]

I may call your Honor's attention to the bottom of page 4 of our stipulation where there is the agreement of counsel that the useful economic lives of the various contracts mentioned here were two years from and after December 31, 1941. In other words, these were construction contracts, and the subsistence activities of the partnerships were expected to have a life commensurate with the lives of those construction contracts.

Mr. McHale: Your Honor, I don't want to be too technical, but that was the estimate made by the revenue agent for the purpose of computing the depreciation of physical equipment.

Now, it is part of the Government's contention that you have to look at the contracts or purchase orders, or whatever they are, in some cases they are not even contracts, that is part of the Government's

contention, because I understand it is part of plaintiff's contention that the consideration was paid for a specific contract, and part of the Government's defense is that with respect to some of these, at least, there were no contracts in existence, there were agreements which could be terminated at any time. The purpose of putting in this paragraph here, I think, was to save some proof here as to the extent—the utmost extent of the life of some of these contracts. And I think the purpose, if the court sees it, is just to see that the revenue agents or the Commissioner [19] had determined for physical depreciation two years was a reasonable life.

The Court: If the court, for instance, decides that Exhibit 9 was a contract and was a valuable contract, and was such a kind of property that it should have been depreciated over a period of time, then under this stipulation the Government would concede that the years '42 and '43 would be the years that it would be depreciated?

Mr. McHale: Yes, if the court decided that. But if it decided it was not a contract, it would not bind them.

The Court: I understand.

Mr. Bennion: Now, Exhibits 10, 11, and 12, are the contracts which existed on the date of death between the California partnership and the Camp San Luis Obispo, Camp Roberts, and California Shipbuilding yards.

The Court: And again it is stipulated that copies are used in lieu of the originals?

Mr. Bennion: Yes, your Honor.

Mr. McHale: Yes, your Honor.

Mr. Bennion: Now, those are significant as the evidence will bring out later, your Honor, in that in their starting dates and their provisions for termination, I believe each of those contracts is terminable—for example, Exhibit 11 on page 2, contains a provision whereby Camp Roberts can terminate the agreement in writing at any time within sixty [20] days; Exhibit 10 contains a provision permitting them to terminate on 30 days notice; and Exhibit 12 has a termination option on the part of the California Shipbuilding yards of 48 hours.

The next exhibit is Exhibit 13, which comprises many documents, and those are the purchase orders obtained, the first four just shortly before the decedent died, from Basic Magnesium, and most of our evidence will center on those.

Perhaps I had better leave it to the evidence to explore the significance of the purchase orders, because they were very substantial business, and the evidence will show that those and also other contracts were——

The Court: 13 is part of the business of the California partnership before the death of the deceased?

Mr. Bennion: That is correct.

The Court: And did that partnership set up dining rooms and dormitories, and things of that sort?

Mr. Bennion: That is correct.

The Court: Was the operation, do you know, somewhat similar to the operation up at the Anaconda place?

Mr. H. S. Anderson, Jr.: Yes, Judge, on a much larger scale. The Darwin mines is a smaller operation.

The Court: But very comparable?

Mr. H. S. Anderson, Jr.: Yes.

The Court: That doesn't mean anything for the record, [21] because you will have to make the record, but it will help me considerably, because I spent some time on that.

Mr. Bennion: Yes.

The Court: Do you want to postpone that until you take some evidence?

Mr. Bennion: Yes.

Now, Nos. 14 and 15 are the agreements between the partnership and Basic Magnesium, Inc., and the release. Until they were executed in 1943 the partnership operated only under these purchase orders which are Exhibit 13. Exhibits 14 and 15 are put in merely to show the full picture of what transpired under that business.

Exhibit 16 is the balance sheet at the date of death, which we have heretofore discussed, and I call your Honor's attention to the fact that on the date of death there were no tangible assets on the books representing the decedent's equity in this business.

The Court: All right.

Mr. Bennion: Exhibit 17 is a similar balance sheet for the Alaska partnership at the date of death, and your Honor will observe that the decedent had a capital account in that partnership of \$39,438.70 at the date of his death.

Exhibits 18 and 19 are the audit reports of the revenue agent who came in and made his examination after the death of the decedent and wrote up his report. His report is dated, [22] as you will see on the front page of both Exhibit 18 and 19, December 13, 1942, or nineteen days after the agreement of December 11th, and these are the reports that set up the useful life of the equipment on a two-year basis at the end of 1941, and which therefore increased the income in the case of the California partnership, which is Exhibit 18, increased the income rather substantially for 1939 and '40 and '41.

And I may say by virtue of that determination rather substantial deficiencies in income tax were assessed and had to be paid by these five plaintiffs after this agreement was drawn up.

So that we take the position, if your Honor please, first that this setting up of equipment is immaterial, as I have heretofore stated, because it took place after these negotiations and after arriving at the value of \$75,000, which value was placed, in the absence of any such increase, on the equipment schedule; and in the second place, the partners here—it does not change the fact that what they purchased and what they paid for was the income to be derived from these contracts, because they derived no benefit from this equipment that was set up subsequently by the agent.

Your Honor will remember that at the pretrial hearing we came in and made the statement that we were not seeking any duplication of deductions,

and although when the original returns were made out by these five individuals the full amount [23] of \$75,000 and \$50,000, and also some other items, were deducted, on our further examination we had ascertained that in so far as the Alaska partnership is concerned, since there were \$39,000, roughly, of tangible assets belonging to the estate, that these taxpayers got the benefit of that taxwise in subsequent years, either through depreciation or through writing off inventory, or the like, so that automatically they got the benefit of a deduction of \$39,000, so that in the conduct of this present case we are conceding that out of the \$50,000 paid to the Alaska partnership \$39,000 has, in effect, been already deducted, and we seek no double deduction, and we are limiting our claim to the difference between \$50,000, and \$39,438.70, or a little over \$10,000.

Now, applying that same reasoning to the California partnership, as I have stated on the date of death and on the date one year later, when this agreement was entered into and when this \$75,000 was negotiated, there was no net tangible asset value on the California books with respect to the decedent's interest, so that we take the position that the full \$75,000, no part of it has heretofore been allowed as a deduction in any form, and that the full amount was paid for intangibles, which we think the evidence will show beyond question was the income to be derived from these specific contracts.

We take the position that the agent by coming in later—— [24]

The Court: Just a minute. Why do you call them intangibles, if you say what was to be obtained was the income from these contracts; why do you call them intangibles?

Mr. Bennion: Maybe I used the wrong term. I meant that they were paying the \$75,000 for the income.

The Court: Which would be derived from contracts, purchase orders, agreements, and so forth, with these various private and government agencies?

Mr. Bennion: That is correct, your Honor. And that that actually transpired. They paid the \$75,000, they carried on these businesses for two years at a terrific profit—I don't mean terrific, but their expectation of income was realized—all of which has been taxed to them, and they have not recovered taxwise their cost of \$75,000 in any manner.

The Court: Do you concede the Government's contention that if the \$75,000 was paid solely for good will, that it can't be recouped?

Mr. Bennion: I would have to define what good will means. I think it is a matter of principle if it was paid for something of value which would go on indefinitely in the future, that it may not be deductible.

The Court: I wouldn't make any legal definition of good will, but my present horseback view of good will is the prospect of securing business without any definite assurance. In other [25] words, if

I went into a company that was merely selling to the retail trade, had no contracts, commitments, orders, or whatever you want to call them, but just relied on the people who dropped into the shop, it would seem to me the prospect of that business continuing in the future would be good will, a part good will. Good will also includes, I suppose, intangibles, such as the outfit's reputation, the people it knows or has done business with in the past, but it all boils down to the prospect of business in the future.

Now, if there is anything concrete, I don't think it would come under the head of good will. Assume, for example, a situation where you had a written agreement signed, sealed and delivered, that over a period of five years the company was going to buy so many widgets each year for that period of time, that wouldn't be good will, that would certainly come under some other classification.

Mr. Bennion: That is what we contend is the situation here, in essence.

The Court: But I wonder if you concede the Government's position that should it turn out—assuming for argument, put it this way, that the court held that all you bought was good will, do you concede the Government's law on the good will problem, namely, that you can't write off good will?

Mr. Bennion: That's right, if you define good will as something that has an indefinite meaning. The reason I would [26] like to put that limitation in is this, your Honor: I don't think there is any magic in words. Under the tax law if a man makes

a capital expenditure, if he can by any way tie that into a number of years or a period over which he might amortize it, there is nothing in the law which will forbid him from amortizing it. In fact, it is expressly granted as a deduction. Now, good will in the sense it is indefinite and will go on forever or an indefinite time, it is true there is no period over which you can amortize it. So that to that extent I would agree, if there was that kind of good will there would be no period over which to amortize it.

The Court: I wonder if that is the right test.

Supposing a man had a shop on a corner out here in L. A., and he knew for certain that two years later in a certain month the City would come in and take his shop and put a freeway through there, so he knew he only had a definite period of, say, two years in which he could run his shop—he had been running it for twenty years, he had customers who came in day after day—therefore his good will, at least viewed from the standpoint of the location, had a definite running-out date, but does that make it terminable, I mean give it such a character that it can be charged off?

Mr. Bennion: I think anything with a definite life can be charged off, your Honor. I think that question is hard in that—— [27]

The Court: You have to have something more than a definite period of time. I have tried to give you an example of where all the fellow had was a knowledge of a definite period of time, to see if I couldn't point up the fact that it is not the definite

period of time that good will may operate that gives it a value that makes it chargeable, but isn't it the fact that there must be something more than the mere expectancy of business?

Mr. Bennion: With all due respect, I would disagree taxwise. There have been so many cases in the tax field defining good will, and it can attach to any number of things, it can attach to a location, it can attach to a name, it can attach to a driver's list of customers, anything of that nature where you have an expectation of continued patronage from the public. If there is no period over which you can say that is likely to terminate, you have no period to amortize whatever you might pay for that preference. But, on the other hand, I would say if you have a definite period, why, you certainly are entitled to amortize your investment over that period.

The Court: You know much more about it than I do, because you and Mr. McHale have been working on this case. I held a pretrial with you and discussed it with you a time or two, but I have done no research on it, and I am just merely trying to test out certain ideas. [28]

That last statement you made, supposing you bought out the Anderson business, we will say the Anderson Linen Service around town, and you bought out the linen service, and among other things bought the right to use the name "Anderson" while you conducted a linen service, would that be buying good will? There is no running-out time, you could use the name "Anderson" forever on the linen service.

Mr. Bennion: It seems to me, your Honor, it is solely a question of fact. If, as it is in this business, if I went to buy this business from the Andersons, I know nothing of the business. It depends, as I tried to point out in our points and authorities, if you have purely a personal service business, without location, where it depends on the skill and the ability of a particular individual, you do not have good will, for the simple reason that when that man dies his good will, if you want to call it that, dies with him, and no one will pay for it. And the evidence will show that that is exactly what we had here. That any success in this business was due to these particular individuals. And there are a host of cases, your Honor, in the tax field where partnerships have dissolved or corporations have dissolved where the Commissioner has come forth and asserted good will, and without exception if they find that the prosperity of the business and the genius of it lies within the personal talents and ingenuity of an individual, it is not good will which can [29] be valued, for the simple reason that you can't sell that. That is what we think was true here. They had no good will. If these particular contracts had not existed, the mere fact that these people had been carrying on a subsistence business was not an asset for which anybody would have paid any money, whether it be these individuals or third persons, or anybody, regardless of your indefinite period.

The Court: All right. We will adjourn to 2:00 o'clock. Are you practically through now? You have three or four more exhibits to cover here.

Mr. Bennion: They will be very short, your Honor.

The Court: And do you propose to offer some testimony, or to rest on the exhibits?

Mr. Bennion: We propose to offer testimony of a witness.

The Court: All right. We will adjourn to 2:00 o'clock.

(Whereupon at 12:05 o'clock p.m. a recess was taken until 2:00 o'clock p.m. of the same day.) [30]

Thursday, January 28, 1954—2:00 P.M.

The Court: All right. Let's proceed.

Mr. Bennion: Your Honor, I think we had about completed these exhibits. We were on numbers 18 and 19, which were the revenue agent's reports, and I believe that I have covered everything there that I had in mind.

Nos. 20 and 21 are the petitions for approval of the contract filed by the administrator of the decedent's estate, and the court's approval, the probate court's approval of the contract.

I may say, your Honor, that we have the testimony of Mr. Anderson, Jr., but if I might make this observation: On the returns that were filed each of these taxpayers deducted their respective shares of the \$75,000 and the \$50,000, and also some \$60,000 of other items, which they were required to pay under this contract. Now, those were miscellaneous items. The important thing, they had agreed to

bear any income tax deficiencies that might be later assessed growing out of the partnership business for prior years. They were called upon to make rather sizable payments under that obligation, and there were other items. The Commissioner has disallowed all of the deductions, as a result of which, as alleged in the complaints, these five petitioners paid income tax deficiencies, aggregating \$87,000, and they were paid early in [31] the year 1947. We are now seeking—although our claims were for the entire sum of the deficiencies paid, we are now waiving our claim to the sixty thousand some odd of other items, and we are waiving the deduction with respect to the thirty-nine thousand of assets appearing on the balance sheet of the Alaska partnership, so that the present case concerns the seventy-five thousand paid with respect to the California partnership, and a little over \$10,000 paid with respect to the Alaska partnership, so that our total claim in these suits, if successful, would be for a refund of approximately \$39,000, rather than the original eighty-seven thousand which was paid, or, roughly, 44 per cent.

The Court: I understand you on your waiver of the sixty thousand miscellaneous deductions, and the difference between the thirty-nine thousand and the fifty thousand item, but you are claiming the whole seventy-five thousand, are you not?

Mr. Bennion: Yes, your Honor.

The Court: You are claiming the seventy-five thousand, and a little over ten thousand on the other?

Mr. Bennion: That is correct.

The Court: You said something about thirty-nine thousand.

Mr. Bennion: The thirty-nine thousand is what——

The Court: Read the very last part of counsel's statement. [32]

(The following portion of the record was read by the reporter: "We are now seeking—although our claims were for the entire sum of the deficiencies paid, we are now waiving our claim to the sixty thousand some odd of other items, and we are waiving the deduction with respect to the thirty-nine thousand of assets appearing on the balance sheet of the Alaska partnership, so that the present case concerns the seventy-five thousand paid with respect to the California partnership, and a little over \$10,000 paid with respect to the Alaska partnership, so that our total claim in these suits, if successful, would be for a refund of approximately \$39,000, rather than the original eighty-seven thousand which was paid or, roughly, 44 per cent.'")

Mr. Bennion: I see your Honor's point. The last thirty-nine thousand would be the amount of the dollar refund, the tax refund.

The Court: Based on seventy-five thousand plus ten thousand?

Mr. Bennion: That's right.

The Court: If you are entitled to the refund, we would have to have it calculated, would we not?

Mr. McHale: Yes. [33]

The Court: The court wouldn't calculate it.

Mr. McHale: No. It would be calculated under Rule 7(h).

Mr. Bennion: That is correct. My only point is that although our complaints seek a judgment of eighty-seven thousand, we are in effect abandoning all but thirty-nine thousand of that claim, \$39,000.

The Court: To make the record appear that you are being fair with the Government, you are only seeking forty-four per cent of what you asked originally?

Mr. Bennion: These sixty thousand dollars of deductions get into a tremendously complicated field, and we believe that they are questionable, but we think the case is complex enough without them.

The Court: All right. Thank you.

Now, do you have some witnesses that you want to call?

Mr. Bennion: Yes, your Honor. I will call Mr. Anderson. [34]

HAROLD S. ANDERSON, JR.

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Harold S. Anderson, Jr.

(Testimony of Harold S. Anderson, Jr.)

Direct Examination

By Mr. Bennion:

Q. Mr. Anderson, you are the son of Harold S. Anderson, the decedent in this case?

A. Yes, sir.

Q. And are you the plaintiff in docket No. 12044-C?

A. I am. I think there are five. Is that my number?

Q. That is your number. Let's get the relationship now of these other plaintiffs. Who is Ethel H. Anderson?

A. My wife.

Q. And when were you married?

A. January 17, 1941.

Q. Who is Robert W. Anderson?

A. My brother.

Q. Is he older or younger than you?

A. Younger.

Q. By how many years?

A. By five years.

Q. How old were you back in 1941? [35]

A. I was twenty-six.

Q. Who is Gloria S. Anderson?

A. Gloria S. Anderson is my brother Bob's wife.

Q. Do you recall when they were married?

A. Yes, I do. They were married June 30, 1939.

Q. And John H. Anderson? A. A brother.

Q. Is he the youngest?

A. He is the middle brother.

Q. How old——

(Testimony of Harold S. Anderson, Jr.)

A. He is four years younger than I am. He is between Bob and myself.

Q. We have stipulated in this case that your father died on December 27, 1941. Was his death unexpected, sudden?

A. Totally unexpected. He died of a heart attack.

Q. Where were you at that time?

A. I was living at West Los Angeles. I had come down from the Basic Magnesium job at Las Vegas for Christmas, and he died on the morning of the 27th of December, two days after Christmas.

Q. How long had you been on the Basic Magnesium job?

A. For approximately, I would say, sixty days.

Q. Mr. Anderson, I will now show you Exhibit 13 here, and would you please direct the court's attention to the first four purchase orders there and indicate the type of operations [36] they called for and the dates of them?

A. Purchase order No. 211 covers the actual opening of the subsistence contract or the subsistence operation that we engaged in.

Q. Where was that located?

A. It called for the accommodation of approximately one hundred men in a dormitory that was already built called the B & G Dormitory, Boulder City, Nevada, about nine miles from the actual construction site of the Basic Magnesium plant.

The Court: That dormitory belonged to the partnership?

(Testimony of Harold S. Anderson, Jr.)

The Witness: No, your Honor, the dormitory belonged, I believe, to the Department of Water and Power. It was used in connection with the Hoover Dam construction.

The Court: Rented by the partnership?

The Witness: No, sir. The Defense Plant Corporation made an agreement with the Department of Water and Power to take that building over for housing of its employees in the initial stage of the construction at the Basic Magnesium job.

The Court: Then they let you have it on some agreement?

The Witness: They provided that building for our use.

The Court: They turned the control of the building over to you?

The Witness: That's right. [37]

The Court: And did your partnership put in the equipment, beds, mattresses, linens?

The Witness: Yes, we did. We supplied all the bedding, equipment, mattresses, linens, and certain items of furniture.

The Court: Were those items in the dormitory on December 27th, '41?

The Witness: Yes, sir.

The Court: It was completely furnished at that time?

The Witness: That's right. I made that my headquarters and my office, and I lived there.

The Court: Go ahead.

(Testimony of Harold S. Anderson, Jr.)

Q. (By Mr. Bennion): What was the date of that purchase order, Mr. Anderson?

A. Purchase order No. 211 was dated December 8, 1941.

Q. Now, can you go on to the next one?

A. The next purchase order is, also, No. 211——

Q. I think that is a change order?

A. That is a change order to the first original No. 211.

Q. Can you go on to No. 212? That is down about the sixth sheet.

A. Purchase order No. 212 is dated December 15, 1941.

Q. What did that contemplate?

A. This contemplated the initial camp construction at the actual job site for approximately 500 men.

Q. What did that entail when you say 500 men—sleeping [38] them?

A. We call them 500 rental units, based on bed occupancy.

Q. Did it also cover feeding them?

A. It also covered feeding in a building to be erected by the Defense Plant Corporation, or McNeil Construction Company, who had the general contract.

The Court: That building was for the feeding only?

The Witness: It was for feeding, general commissary——

The Court: And sleeping?

(Testimony of Harold S. Anderson, Jr.)

The Witness: No. This was merely for the feeding and what we called commissary operations.

That is rather like a general store operation.

This first number of housing units contemplated housing in tents, Army pyramidal tents.

The Court: Who was to put up the tents?

The Witness: My company was to supply all the tent canvas. The Defense Plant Corporation provided the tent frames and the tent flooring.

Q. (By Mr. Bennion): Were you to supply the mattresses and the linen?

A. Of course all the bedding, linens, all the air-conditioning units, which were desert type coolers, and individual gas heating units for each tent.

Q. Now, would you go on, Mr. [39] Anderson—

The Court: How much of your work had been done on December 27th, '41?

The Witness: With respect to this five hundred units here?

The Court: Yes. Were the tents erected or any part of them?

The Witness: No, sir, they were not yet erected, they were in the planning stage. It was part of my job to lay out the camp and set these—stake out the tent site for the erection of the tent frames.

The Court: Had you purchased any of the tent material or ordered it?

The Witness: To the best of my memory we had ordered the tent material.

(Testimony of Harold S. Anderson, Jr.)

The Court: What about furnishing sheets, mattresses, coolers, and things of that sort, do you know what the situation was as to those?

The Witness: All under order, as I recall at this time.

Q. (By Mr. Bennion): Can you proceed there to No. 213?

A. Purchase order No. 213 is dated December 16, 1941.

Q. And what did that cover?

A. That covered an additional six hundred-bed unit in this camp which originally started with five hundred.

Q. That is six hundred in addition to the five hundred on the preceding order? [40]

A. That's right. We now have a total of 1,100 contemplated occupancy.

Q. And were they the same type of—

A. Exactly the same. The first 1,800 units of this camp were in tent housing. The final 1,800 were housed in wooden temporary barracks buildings.

Q. Would you go down, then, to order No. 214?

The Court: On 213 would the situation be the same; would you say the goods and materials that you were to supply were on order?

The Witness: Yes, I can say that we had contemplated these additional units coming through, not knowing exactly then the authorization would come in the form of these purchase orders, which in effect are a contract for the job.

(Testimony of Harold S. Anderson, Jr.)

The Court: By December 27th were your goods on order that you were to supply?

The Witness: Yes, for these units covered by these purchase orders to this date.

The Court: All right.

Q. (By Mr. Bennion): No. 214, that is several pages further on.

A. Purchase order No. 214 is dated December 15, 1941. This purchase order or contract covers the initial equipping by us, our company, of what we call the mess-hall equipment, which is the equipment we provided for the kitchens, the [41] dining rooms, the commissaries, in what we call the mess-hall building, which was a central building in the camp.

Q. Mr. Anderson, would you tell the court just what organization you had up at Nevada on December 27, 1941?

A. Our only organization at that time was a custodian which I had left at the B & G Dormitory in Boulder City. "Custodian" in our business means a janitor. And at the camp site I had left a canteen manager, a man that I had hired locally, to take my place when I left for Los Angeles. So the staff at that time consisted of two men.

Q. What were you actually doing up there in the way of feeding men?

The Court: At the camp site?

Mr. Bennion: At both of these places, the B & G Dormitory and the camp site. Up to December 27, 1941.

(Testimony of Harold S. Anderson, Jr.)

The Witness: At the B & G Dormitory we were feeding nobody, we had no facility to feed at that location. At the camp site, McNeil Construction Company had erected a warehouse building, frame building, wooden building, and I had prevailed on them to take over one end of this warehouse to set up what we call a canteen, and the food that we were able to serve at that time consisted of wrapped sandwiches and bottled milk, hot coffee, and candy bars, which I would purchase at Las Vegas and drive out to the site in my car each day and set it up in this little area that we called a canteen. That is [42] all that was going on at the time, December 27th, in the way of feeding.

Q. (By Mr. Bennion): What was going on there in the way of sleeping men?

A. At the B & G Dormitory in Boulder City I would say we probably had, as I recall, perhaps 40 occupants.

The Court: And none at the camp?

The Witness: None at the camp, because the camp was actually in the initial planning stages. The tent frames hadn't yet been erected, or bath houses hadn't been built, sewer lines hadn't been laid. It was more or less on the drafting board stage.

Q. (By Mr. Bennion): How soon after your father died did you return to Las Vegas, or Nevada?

A. I would say within five days. As I recall, it was just after the first of the year, right after the first of January of 1942.

(Testimony of Harold S. Anderson, Jr.)

Q. What was your purpose in going to Nevada on that occasion?

A. Well, I would say that the purpose was two-fold. I had been called by the project manager from McNeil Construction Company, Mr. Howard Mann, to naturally get back on the job as soon as possible, but to determine two things in my mind: One, as to whether or not we were going to continue on with this contract, and, No. 2, if we determined to [43] continue on with the contract, to attempt to resell McNeil Construction Company, and the Defense Plant Corporation on our ability to continue on.

There was a question in their minds, of course, whether we were——

Mr. McHale: I move to strike what questions were in their minds, your Honor.

The Court: That part may go out.

Q. (By Mr. Bennion): Did you have any conversations with the McNeil Construction official as to whether you were to go on with the contract?

A. Definitely.

Q. Will you give us the substance of that conversation?

A. As I recall it, McNeil Construction Company, being the general contractor, was obligated to continue their part of the job, and we had an important part of their job in the operation of the camp for their construction employees, and——

Mr. McHale: I move to strike his answer as not responsive, your Honor.

The Court: Overruled. Tell us now what the con-

(Testimony of Harold S. Anderson, Jr.)

versation was with the McNeil officials. Who did you talk to and what did you say and what did they say?

The Witness: As I recall, your Honor, Howard Mann, project manager for McNeil, and myself and my father-in-law, Thomas Hamilton, discussed the feasibility of going on, our [44] ability to go on, and as I recall the conversation, we convinced them that we could go on, if McNeil or the Defense Plant Corporation would concede a matter of some \$60,000 worth of equipment, air conditioning equipment, that we were obligated under our purchase orders or contracts to supply. And, as I recall the conversation, Mr. Mann was able to say, "Well, we will absorb that cost, and you take care of the other obligation that you have under these purchase orders."

Q. (By Mr. Bennion): Did you decide right then that you would go forward with the contract?

A. I would say that that concession on Mr. Mann's part was the thing that enabled me to say, "Yes, we will go on with the contract," providing, of course, that they wanted us to go on with the contract. At least I was convinced about that time that we would go on with it.

Q. Before you had that conversation did you talk the matter over with your brother, Bob?

A. I did. He was at the time working at the Douglas Aircraft plant cafeteria at Long Beach, where we were operating, and at the California Shipbuilding yards at Terminal Island, where we

(Testimony of Harold S. Anderson, Jr.)

were also operating, and I consulted with him on what his wishes were or ideas were on whether or not we would continue on or not, and on what basis.

Q. Why did you consult him?

A. Well, first of all, he was a partner of mine in the [45] Alaska partnership; and, secondly of all, I naturally contemplated, had worked out with him a new partnership I had hoped to continue on and attempt to operate these contracts.

Q. Well, did you intend to carry on this California or Nevada operation by yourself, or with your brothers as partners?

A. Never contemplated by myself. My brothers were always included in any thinking that I had as far as a continuance of operations in a partnership.

Q. Was that from the time you decided to go ahead with the Basic Magnesium contract?

A. Well, that thinking was all in a very short period of time.

Q. Things happened fast?

A. My father died December 27th, and I am back at Las Vegas the following week, some five days later. In the meantime, I have come to Los Angeles and I am naturally down at Calship and Douglas, where my brother was representing the company.

Q. Did he advise you that he would go ahead with you? A. Under certain conditions.

Q. What were those conditions?

A. Well, naturally he would want to know how much capital would be required from him in this

(Testimony of Harold S. Anderson, Jr.)

partnership venture and what the prospects, naturally, for profit or loss were, [46] and whether or not my brother, Jack Anderson, would go along as a partner.

Q. Where was your brother, Jack, at that time?

A. He was in the Army Air Corps flying the Hump in India at the time, he was a pilot in the Air Transport Command.

Q. Did he have capital invested in this Alaska partnership?

I will strike that, your Honor. I think that appears in the record.

A. He was a partner in the Alaska partnership.

Q. Did you contemplate that he would join you as a partner in this Basic Magnesium enterprise?

A. I had contemplated it. I had hoped he would, and had every intention of having him join my brother, Bob, and myself, although he was overseas at the time.

Q. Would you say, again, what your brother, Bob, was doing at that time?

A. He was supervising, representing the partnership primarily at Calshipbuilding Corporation's Terminal Island yard where we operated a plant cafeteria and canteen.

The Court: Which partnership was interested there?

The Witness: That is the California partnership.

The Court: He was a salaried employee, then?

The Witness: That is correct.

(Testimony of Harold S. Anderson, Jr.)

Q. (By Mr. Bennion): Was that the contract referred to [47] in the stipulation, which was dated September 2, 1941?

A. I believe that is the date of the contract.

Q. Where was the other operation that he was supervising?

A. The Douglas Aircraft Company's operations at Long Beach, where we operated the in-plant feeding facilities for the plant, central cafeteria and several field cafeterias, as we call them.

Q. Our stipulation, paragraph 6(d) states that your operation in the Douglas Aircraft plant in Long Beach was pursuant to an oral agreement entered into on or about July 1, 1941. Would you explain to the court why there was no written contract for that job?

The Court: What paragraph?

Mr. Bennion: Paragraph 6(d) at the bottom of page 3.

Q. (By Mr. Bennion): What was the situation of your operation down at Douglas?

A. We were operating there under an oral contract, we had no written contract; we had not been able to reduce the oral agreements that we had had to writing at that time.

Q. Were you attempting to do so?

A. We were always attempting to do so.

I might add that plant was a new branch of the Douglas Company, and it was growing so fast that we were all involved in rapid expansion, and it was just one of those things that [48] kept sliding away

(Testimony of Harold S. Anderson, Jr.)

in order to make way for things that had to be done right now.

The Court: You had your equipment in?

The Witness: Yes, sir.

The Court: And in operation?

The Witness: Yes.

Q. (By Mr. Bennion): Would you explain just what kind of organization the California partnership had here in Los Angeles on December 27, 1941?

A. Our general office was at 1063 Gayley Avenue in West Los Angeles.

Q. Who did you have employed there?

A. We had an auditor, we had, I believe, three office clerks working under the auditor, and a stenographer.

Q. Who did you have out at these two jobs that you referred to, the Douglas and Calship?

A. At the Douglas plant we had a manager that worked for the Post Office cafeteria here in Los Angeles, a man named Goodwin, as I recall, that we hired sort of right off the cuff when we needed a man for the job.

Q. That was at Douglas, you say?

A. That was at Douglas.

The Court: Did you have other employees there?

The Witness: At Douglas?

The Court: Yes. [49]

The Witness: Yes, cooks and kitchen help. But as far as the project manager, as we called him, that was the only executive employee.

The Court: What was your brother's title?

(Testimony of Harold S. Anderson, Jr.)

The Witness: My brother, as I said, was a supervising man working between our Los Angeles office and the two jobs at Calship and Douglas.

The Court: Go ahead.

Q. (By Mr. Bennion): Was that just a feeding operation at Douglas?

A. Just a feeding operation.

Q. And also at Calship?

A. Just a feeding operation. No housing.

Q. Would you tell the court the kind of operation that was being conducted at San Luis Obispo and Camp Roberts?

The Court: Before you go into that——

Was your operation at Calship similar to Douglas?

The Witness: Very similar. Both food operations with central cafeteria preparation, kitchens, and canteens or field cafeterias spread out through the works.

The Court: And you had a manager in charge?

The Witness: Yes.

The Court: And help?

The Witness: Yes, cooks and all the necessary help to go with a deal like that. The manager at Calship was a man [50] named Crane, as I recall it, that we hired through an employment agency in Los Angeles.

Q. (By Mr. Bennion): At the time you started that? A. At the time the job was started.

Q. Do you recall whether those contracts were cancelable?

(Testimony of Harold S. Anderson, Jr.)

A. Well, inasmuch as we didn't have a written contract at Douglas there was no cancellation feature there. But the Calship contract, which was a written contract, that was cancelable, I believe, on either 30 or 60 days' notice.

Q. And do you recall whether it was cancelled?

A. Whether it was cancelled?

Q. Yes.

A. The contract was cancelled subsequently in 1942.

Q. I think we have stipulated the date.

A. I don't recall the exact date.

The Court: July 27th, the stipulation says, 1942.

The Witness: Sometime in '42, as I recall.

Mr. Bennion: And the other one was also cancelled.

The Court: The stipulation says that Douglas was cancelled November, 1942.

The Witness: It was in the fall of the year as I recall, yes.

Q. (By Mr. Bennion): The stipulation shows that you had a contract at Camp Roberts, dated June 6, 1941, and a contract [51] of December 9, '41, at Camp San Luis Obispo, the latter one replacing an oral contract of March, '41. Will you tell the court what those operations were at those two Army posts?

A. At Camp San Luis Obispo we operated what were known as the Post Exchange fountain grilles, and the Fortieth Division officers' mess hall.

Q. What did that entail?

(Testimony of Harold S. Anderson, Jr.)

A. That entailed feeding only. No housing. The fountain grille is a glorified sort of fountain operation.

Q. What did you have at those posts in the way of organizational personnel?

A. As I recall, we hired one of the supervisors of the Owl Drug Store chain here in Los Angeles for the manager at Camp Roberts, and Camp San Luis Obispo we had, also, another Owl fountain manager. The organizations at those camps were built up as required at the discretion of each of those two men. Fountain clerks and janitors were about the only classification of employees on those particular jobs, and a cook or two, depending on the activity at the time.

Q. Will you tell the court after having decided to go ahead with the job in Nevada how that expanded, what your operations entailed?

A. As I recall, about six to eight months after the first purchase orders were given to us, that the camp had increased in size to the point where we were feeding and housing [52] approximately 3,600 construction men, plus our own crew, which consisted of some 500 employees at the time, at the peak.

Q. 500 of your own employees?

A. That is correct.

Q. What would they consist of, mainly?

A. Cooks, general kitchen help, mess hall waiters, commissary clerks, bartenders, janitors, which classification took care of the janitor work in the

(Testimony of Harold S. Anderson, Jr.)

dormitories, the housing and the tent areas, canteen workers, truck drivers, warehousemen, auditors, and office clerks——

Q. Were they——

A. (Continuing): Card room employees.

Q. Go ahead.

A. That is just generally the type of employees that were employed doing that type of work.

Q. Were they hired on a permanent basis?

A. I wish they had been more permanent than they were.

Q. How permanent were they?

A. Our manager, our first manager on the project lasted approximately one year, and the kitchen help and the dining room help and the janitors turned over approximately 100 per cent a month.

Q. Where did you recruit that labor?

A. We recruited the labor from our Los Angeles warehouse operation down here at 6th and Alameda, and we would hire [53] as many as 40 people at one time; and we got into the transportation business for a while; we transported under contract with a carrier our employees right from 6th and Alameda to the job site. The turnover, as in most industries of that character during the war, was very, very high.

Q. Do you recall how many meals a day you would serve during the peak operations?

A. Approximately 20,000. That is not a complete meal, but we considered a sandwich a service,

(Testimony of Harold S. Anderson, Jr.)

so we figured we served approximately 20,000 meals a day.

Q. What other services did you provide at Basic Magnesium, aside from eating and sleeping?

A. As I said before, we operated what we call a commissary service within this main central building. We sold workmen's clothing, tobaccos, candies, and general merchandise. We operated a soda fountain in this commissary; we operated a barber shop; we operated a beer bar, just beer, no hard liquor or wine, just bottled beer; we operated a card room where poker was played as a pastime by the men living in the camp; and we operated a billiard room, billiard tables and pool tables, snooker tables; we operated pinball machines and slot machines in the commissary.

Q. This is in Nevada you are speaking of now?

A. Those enterprises are legal in Nevada.

Q. How about drugs? [54]

A. Drugs and sundries in the commissary.

Q. That is part of the commissary?

A. That was part of the commissary merchandise.

Q. Mr. Anderson, I show you an agreement dated December 11, 1942, which is marked Exhibit 2; do you recognize that instrument?

A. Yes, I do.

Q. Who was Orien H. Anderson who is a party to that agreement?

A. She was the widow of my father, Harold Anderson, Sr.

(Testimony of Harold S. Anderson, Jr.)

Q. Was she your mother?

A. No, she was not.

Q. She was your stepmother?

A. Stepmother, by marriage.

Q. Was she represented by independent counsel in drafting that agreement?

A. Yes, by an attorney named Frederick Mahl, as I recall, M-a-h-l, and a John Wheeler. I don't recall which office he worked out of.

Q. Any others?

A. As far as I know, those were the two lawyers that represented Mrs. Anderson.

Q. Was Mr. Hubert Morrow in the negotiations?

A. Yes, I recall he was, because I am sure he was in the negotiations inasmuch as John Wheeler was associated with [55] Mr. Morrow. If I am wrong, I don't know. But I recall his name. Wheeler and Mahl stand out in my memory as the men who were in on the negotiations at all times.

Q. Was that contract the result of protracted negotiations?

A. Yes, some eight months of negotiations.

Q. In that contract you agreed to pay to the estate of your father \$75,000 with respect to this California partnership; was that price, value, subject to negotiation between you, on the one hand, and Mrs. Orien Anderson, on the other, through your respective counsel?

A. Yes, it was. That was the sixty-four-dollar question, the price that we could agree on as to setting a value on contracts that we were purchasing.

(Testimony of Harold S. Anderson, Jr.)

Q. Would you tell the court why you——

A. That we hoped to purchase.

Q. Would you tell the court why you were willing to pay into the estate \$75,000?

A. Well, I figured that we had a chance to make a profit by operating the contracts, and in our best judgment that was the price that we could afford to pay and get our money back and hope to make, naturally, an additional profit on top of it.

Q. Were you familiar with the books of the company at that time? A. Yes, I was. [56]

Q. And its balance sheet? A. Yes, I was.

Q. What was your educational background?

A. I was a graduate from Stanford University in 1936, economics major, and I then went on to Harvard Business School, took a year of business administration courses at Harvard Business School.

Q. And when did you graduate from there?

A. June of 1937, if I recall.

Q. I think the stipulation shows that you entered into this partnership with your father at the beginning of 1938? A. That is correct.

Q. Who kept the books and records of the partnership? A. At what date?

Q. Well, from the beginning on up to your father's death.

A. I was the general bookkeeper from 1938 until about the time that we took on the Camp San Luis Obispo operations in 1941.

Q. Then who kept the books?

A. A man by the name of James Colliss was the

(Testimony of Harold S. Anderson, Jr.)

man that relieved me and took over the books, sometime early in 1941.

Q. Were you aware of the fact—I call your attention there to Exhibit 16—that your father's capital account showed no net worth on the date of his death? [57]

A. Yes, I was.

Q. In your negotiations, was anything ever said regarding good will?

A. Never anything to my recollection was ever said about good will.

Q. Did you pay any money for good will?

A. No.

Q. What was it that you paid for for that \$75,000, or obligated yourself?

Mr. McHale: I object to that question, your Honor. The contract speaks for itself and is the best evidence of what the parties purchased. That is Exhibit 2.

The Court: Objection sustained. Let me see Exhibit 16.

(Document handed to the court.)

Q. (By Mr. Bennion): Mr. Anderson, I will ask you if there was any good will in the business of the California partnership at the date of death?

A. I would say no.

Q. Would you explain why?

A. Well, this business that we happened to be in to me is a business of personal service, and its success depends entirely on the active operating work-

(Testimony of Harold S. Anderson, Jr.)

ing partners. When H. S. Anderson, Sr., died, the good will was attached to him, any good will that he had built up was certainly his, and as far as I am concerned it died with him. [58]

Q. Why, then, were you willing to pay \$75,000?

A. Because I was aware from my own knowledge and experience, as a partner in this business, of the profit prospects or possibilities from the contracts that were then existent in this California partnership.

Q. Were those profits realized?

A. I would say they definitely were realized.

Q. Do you remember roughly how much profit was earned during '42 and '43 by the California partnership?

A. As I recall it, in 1942 the partnership profit was approximately \$246,000 as reflected in our books and tax returns.

The Court: How much?

The Witness: \$246,000, approximately.

The Court: This is the California partnership?

The Witness: The California partnership, 1942 profit. In 1943, as I recall the California partnership profit was approximately \$96,000. And based on that profit showing I think quite naturally the contracts that we bought for \$75,000 were certainly well repaid.

The Court: Let me interrupt, if I may.

Mr. Bennion: You bet, your Honor.

The Court: On this Exhibit 16—this was a double entry set of books, I take it?

(Testimony of Harold S. Anderson, Jr.)

The Witness: Yes. [59]

The Court: The first item shown is cash, and it shows in red figures some \$18,000, and \$18,000 in the red. How did that come about?

The Witness: Judge, that is the type of bookkeeping that we were employing at the time. It was called a voucher system, as I recall, and we had no accounts payable ledger, so in effect the bank account, the bank balance consistently showed an overdraft or a red figure.

The Court: Why would that be?

The Witness: I would like to call on Mr. Arnold to explain that particular type of bookkeeping, if he will.

The Court: All right. We will pass that for the time being.

In other words, the bank balance, when you balanced it out, showed in substance an overdraft of checks drawn against actual deposits made?

The Witness: Yes.

The Court: I notice as liabilities you have listed H. S. Anderson—that is your father?

The Witness: That's right.

The Court (Continuing): \$29,013.26. How was that a liability to your father?

The Witness: Well, that was an advance of cash moneys to this partnership.

The Court: He advanced to? [60]

The Witness: That is correct.

The Court: Was there a ledger sheet kept for your father H. S. Anderson?

(Testimony of Harold S. Anderson, Jr.)

The Witness: Each of the partners had a ledger sheet, yes, sir, showing their capital accounts.

The Court: Was it a capital account or an advancement account? I don't know whether it makes any difference or not.

The Witness: I can't answer that, Judge, just offhand.

The Court: I notice your name doesn't appear, no money due you from the partnership.

The Witness: Well, my contribution to this partnership was services only at that time.

The Court: You had made no capital contribution?

The Witness: I had made no capital contribution. My services were my contribution.

The Court: And your brothers, J. H. and R. W., the figures shown after their names were those capital, or——

The Witness: Those were advances from their share in their participation in the Alaska partnership.

The Court: Maybe this is a simple question, and I don't know enough about books to answer it: How would it happen that your net worth would come out exactly zero?

The Witness: I would say, first of all, Judge, that there were no profits, no surplus earned at that time. [61]

The Court: Had your father ever had a capital account set up where he showed a capital investment?

(Testimony of Harold S. Anderson, Jr.)

The Witness: I don't recall, Judge. I can't answer that without checking back on the records.

The Court: Of course if your father never had a capital account——

The Witness: I might answer it this way, Judge, excuse me, that ever since I can remember any profits that he was ever able to make in this business when he was working by himself before I joined with him, he never had any capital, whatever earnings he made or profits, he immediately withdrew them from the business and lived on them, frankly. It was that kind of a business, and he was that kind of an operator, whatever he made he immediately withdrew it because he needed it to live on.

The Court: All right. Go ahead.

Mr. Bennion: Your Honor, maybe I could make this observation as to why it comes out exactly zero. Whatever there was in that business at the date of death in this contract was treated as an advance and payable by the partnership back to his estate, so that you will remember this morning——

The Court: That would have varied. I could see how that would happen. In a double entry set, assets equal liabilities, and here was an account of advances made by the deceased, I imagine if there was any activity on that account, variations in that account alone would take care of the question I asked. [62]

Q. (By Mr. Bennion): Mr. Anderson, did you

(Testimony of Harold S. Anderson, Jr.)

at my request jot down from your audit statements the figures of income of these partnerships for '42 and '43?

A. Yes, I did. I have them written down here. I was just quoting them from memory a moment ago.

Q. I don't think you had the right figures, and I was wondering——

A. I could quote them exactly now.

The Court: All right.

The Witness: 1942 profits of the California partnership were \$274,858.46.

The Court: And the '43 figure?

The Witness: The '43 profits of the California partnership were \$184,799.79.

The 1942 profits from the Alaska partnership were \$96,666.32. The 1943 profits from the Alaska partnership were \$130,839.92.

The Court: Your contracts with the Government weren't subject to renegotiation?

The Witness: No, sir, they weren't: That Alaska contract—I will retract that statement, it is not quite correct. The Alaska contract was a contract directly with the War Department, cancelable on one hour's notice, any time they wanted to take over, and there was no clause in that contract, as I recall, that mentioned renegotiation of profits. [63] The Basic Magnesium contract, the Defense Plant Corporation had no provision for renegotiation of profits.

The Court: Go ahead.

Q. (By Mr. Bennion): Mr. Anderson, do you

(Testimony of Harold S. Anderson, Jr.)

recall when the estate received these payments of \$75,000 and \$50,000?

A. Yes, as I recall, those payments were made in December of 1942.

Q. Do you recall the date?

A. I would say they were concurrent with the execution of the settlement agreement, which was signed on December 11, 1942. Of course, they were subject to the approval of the court, but the moneys were paid over, as I recall, in December of 1942.

Mr. Bennion: If your Honor please, I have an estate tax return of the decedent, which is kind of a bulky document, and I only wanted the witness to identify these particular assets as having been reported on the return. Could I have the witness refer here and read into the record——

The Court: Have you shown it to counsel? Maybe counsel can look at it and then you can read into the record what you want from it.

Mr. Bennion: If your Honor please, with counsel's permission, I would like to read into the record: The estate of H. S. Anderson, deceased, filed an estate tax return on which in Schedule F—— [64]

The Court: What date was it filed?

Mr. Bennion: On or about March 25, 1943. On Schedule F under the designation "Other miscellaneous property" there was included the following items:

"1. Partnership interest, 40 per cent in co-partnership of Anderson Brothers Supply

(Testimony of Harold S. Anderson, Jr.)

Company of Alaska, community property of the fair market value of \$50,000.

“2. Partnership interest——”

Mr. McHale: Show the value at date of death.

Mr. Bennion: Value at date of death \$25,000.

That is the community one-half.

Do you agree to that?

Mr. McHale: That is what it says.

Mr. Bennion: Now, No. 2.

“Partnership interest, 75 per cent in co-partnership of H. S. Anderson Company, separate property of the fair market value of \$75,000.”

Then I am skipping No. 3——

The Court: Was that also listed as community property?

Mr. Bennion: No. That is separate property, full value of \$75,000 included.

No. 3 is not material here.

“No. 4 Account receivable from H. S. Anderson Company, community property \$29,013.26.” [65]

Value at date of death is one-half, or \$14,506.63.

Schedule F also states:

“As to separate or community property see copy of contract and court order approving same attached hereto.”

Likewise with the consent of counsel I call attention to the fact——

(Testimony of Harold S. Anderson, Jr.)

The Court: First, is it stipulated that that is what the estate tax for the estate of H. S. Anderson, deceased, shows?

Mr. McHale: That is what Schedule F of the estate tax return shows.

The Court: All right. Go ahead.

Mr. Bennion: And that return reported an estate tax due in the sum of \$71,631.62.

The Court: How is that material?

Mr. Bennion: As to the actual tax?

Mr. McHale: I don't believe there is any materiality.

Mr. Bennion: We take the position, your Honor, that having reported these interests as assets in the estate, it furnished an income tax basis. In other words, these interests and contracts as the witness has testified were valuable, and an estate tax was paid on them, and the full income as and when collected would not be subject to tax, even if the estate had held on to them; they would have this basis to be recovered. So it is our position that that basis should be [66] recovered whether in the hands of the estate or by whoever purchased it.

Following the general rule that assets included in an estate tax return require a basis which is entitled to be recovered taxwise.

Q. (By Mr. Bennion): Mr. Anderson, regard the Alaska partnership would your testimony be the same with respect to good will as you have testified as to the California partnership?

A. Yes, it would.

(Testimony of Harold S. Anderson, Jr.)

Mr. Bennion: That is all, your Honor. You may take the witness.

The Court: All right. You may cross-examine.

Cross-Examination

By Mr. McHale:

Q. Mr. Anderson, what date did you say you came down from Nevada, approximately, that is, in 1941, when your father died?

A. As I recall, Mr. McHale, it was the 24th of December, which was the day before Christmas.

Q. Did your father die suddenly of a heart attack, or had he had any preliminary warning at all?

A. He died in his sleep very suddenly.

Q. And when was the last time that he had been in Nevada [67] working on this project?

A. I would say he had been in Nevada about the first week in December in 1941.

Q. Had he been there continuously for some time prior to that?

A. Prior to that, no, sir. I think he perhaps had made, as I recall, maybe two trips before the December trip.

Q. When was his first trip?

A. I believe it was in October. I was closing down a camp in northern California at the time, I recall he was there in October, and I came down and I then went to Las Vegas shortly after I arrived here.

Q. Did you meet him in Las Vegas?

A. No.

(Testimony of Harold S. Anderson, Jr.)

Q. When he made his first trip to Las Vegas did he then return to Los Angeles?

A. He came back to Los Angeles.

Q. What did he do on his first trip? Did he tell you what he had done on his first trip?

A. Yes, sir; he was attempting to negotiate a contract.

Q. With whom?

A. With the same Howard Mann that I spoke of earlier.

Q. How do you spell his name?

A. M-a-n-n, Mann, who was the general manager for McNeil Construction Company. [68]

Q. Prior to purchase order 211, which is part of Exhibit 13 which you have already testified to today, was there any other kind of memoranda, any kind of agreement?

A. To my knowledge there was no agreement of any form except what was brought to this point in purchase order 211.

Q. Do you know the approximate date you went up to Nevada for the first time?

A. I would say the first part of November, 1941.

Q. What did you do up there?

A. As I recall, the first trip I made I was in the negotiations with Howard Mann along with my father on the contracts.

Q. Your father was there at that time?

A. That is correct. I was there with him on that one occasion, as I recall, when we were there to-

(Testimony of Harold S. Anderson, Jr.)

gether. And he had been there, as I said, once or twice before that time.

Q. Did you know Howard Mann before that time? A. No, sir.

Q. You met him for the first time?

A. Yes, sir.

Q. Was there anybody else in the negotiations?

A. As I recall, the negotiations were conducted with Howard Mann at this particular stage of the negotiations, in the purchase order stage.

Q. At this time there were no purchase orders, were [69] there; the first purchase order No. 211 is dated December 8, 1941, is that not true?

A. That is correct, I believe.

Q. In advance of this purchase order was there any kind of oral agreement or oral arrangement entered into whereby the H. S. Anderson Company was to provide any services?

A. To my knowledge there was not. There was merely conversation and negotiations up to that point.

Q. Then you came back to Los Angeles after this first meeting up there in November?

A. Yes.

Q. And when did you go back to Las Vegas or Nevada?

A. I would say the first week in December, prior to the—just prior to purchase order No. 211.

Q. What was your reason for going at that time?

A. My primary job was to start operations in the event that we got the authority through these

(Testimony of Harold S. Anderson, Jr.)

purchase orders or this purchase order to proceed.

Q. And did your father go with you on that trip? A. No, he did not.

Q. When did you first see purchase order No. 211?

A. I would say the same date that it was issued at Las Vegas by the Defense Plant Corporation.

Q. You were up there and you saw it before it got to Los Angeles, is that right? [70]

A. I think I did. I can't remember exactly. But I saw it immediately after it was written.

Q. Was your father there at that time?

A. No, he was not.

Q. What did you do at that time upon seeing the purchase order?

A. Upon seeing the purchase order?

Q. Yes.

A. I proceeded to make ready the opening of this B & G Dormitory to take men as called for under that purchase order. I made my——

Q. Did you hire those two employees that you had there at that time?

A. I hired those two men myself. I made my headquarters, as I stated earlier, in this B & G Dormitory. I took a room, an office, and made it my living quarters.

Q. In respect to this Alaska partnership had you been to Alaska?

A. At what date?

Q. Prior to your father's death had you gone to Alaska?

(Testimony of Harold S. Anderson, Jr.)

A. Definitely. I was in Alaska the months of June and July of 1941.

Q. Were either of your brothers up there before the date of your father's death?

A. My brother John started the project in July of 1940. [71]

Q. Was your father up there at the time your brother John was up there? A. Yes, sir.

Q. How much time did you spend up there at the Alaska partnership before your father died?

A. The job opened, as I recall, in July of 1940, or June, 1940, because I was there shortly after the opening. I spent, as I said before, the months of June and July on the job at Anchorage.

Q. After you left Alaska that time did you ever go up there again before the date your father died?

A. I don't believe I did, because I was involved in the starting of the Basic Magnesium project.

Q. And did your brother John remain up there?

A. My brother John left Alaska in January of 1941. He entered the Army Air Corps in that same month.

Q. Did any other member of your family remain up there or go up there between that time and the date that your father died?

A. No, sir, not to my recollection.

Q. Your father, did he go up there?

A. He may have been there once between January of 1941, and December 27th, the date of his death. Because I was there the two months in the

(Testimony of Harold S. Anderson, Jr.)

middle of the year, June and July. My brother Jack had come out in January, '41. [72]

Q. Who managed the project in the absence of yourself, your brothers, or your father, in Alaska?

A. The Alaska project?

Q. Yes.

A. A man by the name of Rather, R-a-t-h-e-r, Douglas Rather.

Q. After your father's death did you go up to Alaska to visit the project again?

A. On regular trips. That was part of my responsibility.

Q. When did you first go up after your father's death?

A. As I recall, I made a summer trip in 1942, which was approximately six months after he died.

Q. Did any other member of your family go up before that time?

A. No, sir.

Q. This manager remained managing this outfit after your father died?

A. Yes, until I relieved him of his job in early 1943, as I recall.

Q. Was there anybody else besides Mr. McNeil that you negotiated with on the Nevada project, or was he the man you always dealt with?

A. Subsequently we negotiated with a man named Louis Ben, who was the housing administrator for the Defense Plant [73] Corporation. And another gentleman by the name of Frank Case, who was the project manager succeeding Mr. Howard Mann.

(Testimony of Harold S. Anderson, Jr.)

Q. Immediately upon the death of your father, Mr. McNeil was informed of that, was he?

A. Yes.

Q. And you had a conference as soon as you returned to Nevada, as you stated? A. Right.

Q. Was this order No. 1933, dated March 2nd, 1942, Exhibit 13, the first one to carry your name, rather than your father's, that is, Harold S. Anderson, Jr.?

A. As I recall, that was, yes. It was in March of '42.

Q. Did you give Mr. McNeil instructions with regard to that, or was it done as a matter of course?

A. I think that was done of their own volition, inasmuch as I was the man that they were directly dealing with.

Q. Your father's widow, Orien Anderson, did she ever participate before your father's death in any of his partnership businesses?

A. No, sir.

Q. After his death did she participate in any of the negotiations with the Defense Plant Corporation, the Basic Magnesium of Nevada?

A. No, sir.

The Court: We will take the afternoon recess at this time. [74]

(A recess was taken.)

The Court: Proceed.

Q. (By Mr. McHale): To go back to negotiations in 1941 with respect to Basic Magnesium

(Testimony of Harold S. Anderson, Jr.)

project, I think you said that your father made a second trip to Nevada in December?

A. As I recall, he did.

Q. Was that the same time that you were there?

A. I was there at that time.

Q. For how long a period was he there?

A. We were together there for the same time, I would say we were there for two days on that trip.

Q. Was the whole time consumed in negotiating, or were any other steps taken towards settling the project?

A. I would say the entire time was taken up in negotiating.

Q. And those are the only two times that your father ever went to Nevada on this project?

A. No. I said he went three times; two times himself, alone, and once while I was there.

Q. This was his third and last trip?

A. That is correct.

Q. How did you go about providing for the various materials that you would need in setting up the tent camp?

A. It required the placing of purchase orders with a Los Angeles company called The United Tent and Awning Company, [75] for the tent canvas.

Q. Who did that?

A. I made those arrangements.

Q. How did you go about providing for the bedding and linens?

(Testimony of Harold S. Anderson, Jr.)

A. As I recall, I made arrangements for the initial purchases from the Inco Company for the beds, a local Los Angeles concern, and for the blankets, as I recall, my father purchased the blankets from the American Woolen Company.

Q. How did you provide for the air conditioners and gas heating units?

A. I bought those, the air conditions I believe were manufactured by the Royal Manufacturing Company of—out here in Alhambra, for the desert type coolers that were used in the tent cooling system; the heaters were butane space heaters that I bought from O'Keefe & Merritt, a local manufacturer.

The Court: What was this \$60,000 item that involved heaters or coolers or something, which McNeil was to take over?

The Witness: That was for the heating and cooling of the main central building, the wooden building that housed the mess halls, the kitchens, the offices, et cetera.

The Court: It did not apply to these tents?

The Witness: No, sir. And, furthermore, to the wooden dormitories that were subsequently [76] built.

Q. (By Mr. McHale): Who planned the layout of the camp?

A. I planned the layout of the camp with a man named Richard Stadleman, who was an engineer on the staff of McNeil Construction Company. He is now a practicing architect in Las Vegas.

(Testimony of Harold S. Anderson, Jr.)

We were given the general location of the camp, and from that point on Mr. Stadleman and I laid out the camp on this designated area.

Q. In Exhibit 13, these various purchase orders having to do with the Basic Magnesium plant, I notice purchase order No. 3836 was made out to the Anderson Brothers Supply Company of Nevada, and it is dated April 21, '42; will you please explain what the Anderson Brothers Supply Company of Nevada was, or how that name was used in the purchase order?

A. That name was merely a trade style used for the Nevada project. The California partnership was the actual partnership that had the contracts, but the trade style we called the Anderson Brothers Supply Company of Nevada.

Q. When was that trade style adopted?

A. I would say it was adopted at the time, concurrently with the formation of the H. S. Anderson Company, the California partnership that succeeded——

Q. Wait a minute. Wasn't the California partnership started in 1938?

A. That is correct, that is the partnership of my father [77] and myself.

The Court: You didn't hear the last part of his answer. He said, adopted concurrently with the formation of the H. S. Anderson Company partnership, which was something that formed after his father's death.

The Witness: That's right.

(Testimony of Harold S. Anderson, Jr.)

Q. (By Mr. McHale): You mean, then, that another and new partnership was formed on the date of your father's death? When was this new partnership you are speaking about formed?

A. That was formed December of 1942, that is H. S. Anderson Co., that is what I called the new partnership.

Q. To refresh your recollection, I want to show you Exhibit 13, purchase order 3836, which is dated April 21, 1942.

A. This was during the period we were negotiating the settlement agreement, at which time I as a surviving partner was operating these facilities.

Q. How did you happen or how did this purchase order happen to be issued to Anderson Brothers Supply Company of Nevada?

A. Because we had notified the Basic Magnesium officials that this was the trade style that was being used on this particular project.

Q. Prior to that, if you will look through Exhibit 13, purchase order No. 1933 is made out to Harold S. Anderson, Jr.

The Court: Is there only one purchase order in Exhibit [78] 13 made out to the Anderson Brothers Supply Company of Nevada?

Mr. McHale: No, your Honor, there are others. I can't say without looking at the exhibit.

The Court: All right. Let's go ahead.

Q. (By Mr. McHale): When did your other brother come back from the Air Force to join the various partnership enterprises?

(Testimony of Harold S. Anderson, Jr.)

A. He came back from overseas in 1943, early 1943, but he was not out of the Army, he was assigned as a pilot instructor at Palm Springs Air Base.

Q. That was your brother Jack?

A. John, Jack, that's right.

Q. Did your brother Robert go to Nevada with you after the death of your father?

A. Yes, he did.

Q. When was the first time?

A. I would say early in 1942.

Q. How early, approximately?

A. February. I made regular trips there, of course, myself, once a week, commuting to the jobs between there and Alaska; but he went on almost every occasion with me from that time on until he was——

Q. I didn't quite get the ages of your brothers. In 1941 how old was your brother Bob?

A. He was 22½, I would say, just 22. [79]

Q. And your brother John?

A. A year and a half older, approximately, 23½.

Q. And you were 26 at that time?

A. 26½. I was 27 in 1942.

Q. The new partnership agreement which is Exhibit 3, which was entered into on December 23, 1942, states that Ethel Hamilton Anderson contributes \$7500, and Gloria S. Anderson \$3750, and that Ethel Hamilton Anderson should have a share of the profits of 7.5 per cent, and Gloria S. Anderson 3.75 per cent, and that H. S. Anderson, Jr., should

(Testimony of Harold S. Anderson, Jr.)

have 42.5 per cent, John Hardy Anderson 25 per cent, Robert W. Anderson 21.25 per cent in that partnership? A. That is correct.

Q. Were the shares of the partners in the assets of the business to be the same as their share in the profits? A. Exactly the same.

Q. Would the same be true as to the Alaska partnership? A. Yes, sir.

Q. All of the various contracts that were in existence in both the Alaska and California partnerships, including all the various operations, were terminable at the will of the other party, were they not?

A. Yes, on 30 days' notice, the highest being 60 days, and one or two of the contracts on 48 hours notice, particularly those with the Army. [80]

Q. What was the nature of your establishment in Los Angeles, that is, this Alameda warehouse establishment that you spoke of?

A. That was used as a purchasing office and an assembly point for merchandise that was shipped to the Nevada operation.

Q. Was it used in connection with the other operations?

A. Oh, yes, and San Luis Obispo and all the operations that worked out of this area.

Q. How large a building was it, in general terms?

A. The frontage on 6th Street was 50 feet, with another 50 feet and a vacant driveway or truck parking area, and I think the property was 150 or

(Testimony of Harold S. Anderson, Jr.)

-60 feet deep. It was an old warehouse building.

Q. Did you ship all your supplies through Los Angeles, or was there local buying at the various places?

A. There was local buying at the various operations.

Q. Did you have central accounting in Los Angeles?

A. At 1063 Gayley Avenue, which was the home office, the accounting office.

Q. How many employees were there—Strike that.

When did you establish this Gayley Avenue office? A. In 1941.

Q. And when did you establish the warehouse?

A. At approximately the same time. The warehouse was [81] used as a purchasing office.

Q. What persons did you have purchasing materials, aside from yourself or your father?

A. A purchasing agent named Shawver.

Q. How long was he with you?

A. Approximately a year, a year and a half.

Q. What period, approximately?

A. From about the middle of 1941 until the end of 1942. My brother Robert Anderson took over Mr. Shawver's duties as purchasing agent after Mr. Shawver left.

Q. Your father left no will, is that correct?

A. That is correct.

Mr. McHale: I think that will be all. Just a moment.

(Testimony of Harold S. Anderson, Jr.)

Q. (By Mr. McHale): Exhibit 16, this balance sheet that you already examined, shows the payables to H. S. Anderson and J. H. Anderson and R. W. Anderson. When the profits weren't withdrawn from the business how would you show it on the balance sheet? As a liability?

A. As owing to the partners.

Q. So liability and net worth would be the same?

A. Not necessarily. The profits up to that point—there weren't any profits. The capital that had been invested was tied up in inventories and working capital. That is in the California partnership. The Alaska partnership had shown a profit, which was the source of the capital funds and [82] the working capital for the California partnership at that time.

Q. Who were the partners in this Anderson Brother Supply Company of Nevada, partnership?

A. That was a fictitious trade style, as I have mentioned earlier. The same partners in that company were the partners of the H. S. Anderson Company.

Q. At that time wasn't the H. S. Anderson Company just you?

A. Well, that is true, that is correct.

Q. This was a——

A. I was a surviving partner, and I guess I would be the Anderson Brothers Supply Company of Nevada at that time.

Mr. McHale: That is all.

The Court: I want to ask a question or two.

(Testimony of Harold S. Anderson, Jr.)

You made the settlement agreement on December 11, 1942?

The Witness: Yes, sir.

The Court: And that agreement recites that you paid to the estate the \$75,000?

The Witness: That's right.

The Court: And it recites, also, that you and your brothers paid to the estate \$50,000.

The Witness: Yes.

The Court: Now, the corporation, the H. S. Anderson Company, formed after your father's death—strike out [83] "corporation"—the partnership which is shown by the exhibit numbers formed after your father's death, H. S. Anderson Company, wasn't formed by agreement until December 23rd, '42?

The Witness: That is correct.

The Court: What about this interim in there, between December 11th and December 23rd? You testified the money was paid to the estate on December 11th, even though it was to be some time later that the agreements were confirmed. Did you personally dig up the \$75,000 that went to the estate?

The Witness: No, sir; I didn't have it.

The Court: Where did it come from?

The Witness: Through bank loans.

The Court: Did you make the loans?

The Witness: Yes, I did. The Security-First National Bank, the head office.

(Testimony of Harold S. Anderson, Jr.)

The Court: You borrowed the \$75,000, then, to pay into the estate?

The Witness: It was more than that I borrowed. The borrowings took care of the \$75,000 and other obligations at the time.

The Court: There were other obligations, I know, but I am interested particularly in the \$75,000.

The Witness: Yes.

The Court: You signed the note for that?

The Witness: Yes, I signed the notes at the Security [84] Bank.

The Court: Did anyone else sign the note with you?

The Witness: I believe my brother, Robert Anderson, signed the note with me. My brother, Jack, was overseas. In other words, we were at all times negotiating and all the time with the idea that we would have our partnership in effect if and when we could make this settlement agreement with the estate.

The Court: The partnership that came along that was formed on December 23, 1942, then claimed the payment of that \$75,000?

The Witness: That is right. Each of the partners had taken on an obligation.

The Court: And in the two successive years, '42 and '43, claimed \$37,500 of it in each year as a deduction?

The Witness: That is correct.

The Court: How did you get the transfer, or

(Testimony of Harold S. Anderson, Jr.)

what were the bookkeeping transactions between the payment of the \$75,000 to the estate by you on December 11th and the claim after December 23rd, '42, that the money had been paid by the partnership?

The Witness: Because it was set up on the books of the then existing partnership, which was H. S. Anderson.

Mr. Bennion: If your Honor please, I don't want to interrupt this testimony, because it is very material, but an error has crept in here which I was going to clarify, [85] and that is I was going to show the witness this bank statement. The contract of December 11th, '42, was filed with the court for approval, and I want to call the witness' attention to the fact that that approval, which is Exhibit, I believe 20 or 21, was dated December 22nd, if I could show it to him, fix the date of December 22nd as the time for the hearing, and if I can show the witness a bank statement to refresh his recollection, I believe——

The Court: Yes. I may have led him off into a ditch here with these questions. Show him the bank statement.

Mr. Bennion: Mr. Anderson, I show you a bank statement of Security-First National Bank, Estate of H. S. Anderson, Deceased, and ask you to give the date on which some deposits appear there, and to explain what they mean?

The Witness: Well, this deposit here, of course, is the result of one of the bank loans.

(Testimony of Harold S. Anderson, Jr.)

Mr. Bennion: When you say a deposit here, it is what——

The Court: Now, wait. You are talking about the estate account, are you?

Mr. Bennion: Yes, Estate of H. S. Anderson.

The Court: And the witness here was the administrator?

Mr. Bennion: Yes.

The Witness: That's right.

The Court: So the account shows a deposit of \$141,480.05 on December 22nd, '42. Now, was that the \$75,000, plus some [86] of the other matters called for in that contract?

The Witness: Plus \$29,000, I think, that was used to clean up the obligation to H. S. Anderson. And seventy-five for the purchase of the prospective contracts in each of the two partnerships.

The Court: There is a figure here shown as a deposit to the estate account of \$12,533.21 on October 30th, '42.

The Witness: That is this figure here (indicating).

The Court (Continuing): Which is the first pencil figure. Then appears the one hundred forty-one thousand odd dollars deposit we talked about on December 22nd, '42. That is the second penciled figure.

The Witness: That's right.

The Court: They total \$154,013.26. Subtracting from that \$29,013.26 we have the penciled figure \$125,000. Therefore the \$125,000 would be the fifty

(Testimony of Harold S. Anderson, Jr.)

and the seventy-five thousand dollars, the twenty-nine thousand-dollar figure would be the amount paid to your father's estate, money due him?

The Witness: That is correct.

The Court: So the point is that added together and totaling one hundred fifty-four thousand some odd dollars they equal the two deposits shown on October 30th, '42, and December 22nd, '42. I think it is clear.

The Witness: That is the arithmetic. [87]

The Court: Therefore, the payment made, if it was made, on December 11th, '42, of the fifty and seventy-five thousand dollars, was a conditional payment, conditional upon the matter being approved by the court?

The Witness: That is correct.

The Court: So the day following court approval the partnerships were formed?

The Witness: I would say that is true. I don't know what the legal aspects are.

The Court: Is that what you want?

The Witness: Counsel will have to answer that one. I am not a lawyer.

Mr. Bennion: Is it your recollection that this borrowing from the bank was made after the court had approved the contract, rather than on the day the contract was signed?

The Witness: I couldn't answer that. I don't remember without studying it further. December was the month that all these things happened.

(Testimony of Harold S. Anderson, Jr.)

Mr. Bennion: Who borrowed the money, Mr. Anderson—you, personally, or the partnership?

The Witness: I just told the court that my brother, Robert, and I signed the note, cosigned the note at the bank.

The Court: Well, you might have cosigned the note, but do you recall whether the note was also signed on behalf of the partnership? [88]

The Witness: Judge, I can't remember offhand.

The Court: Well, I don't know that there is any particular materiality in this matter.

Do you think there is, Mr. McHale?

Mr. McHale: I don't believe so, your Honor.

The Court: If the court approved the compromise on the 22nd, and the partnership was formed on the 23rd, and we see the major portion of the money deposited in the estate account on the 22nd, even if the money was borrowed on the signature of H. S. and Robert, the only loose end would be the brother in the Air Corps, and I wouldn't imagine that would present any problem.

Mr. McHale: The terms of the agreement, your Honor, I think, provide who purchased what, and the terms of the agreement are very clear, as far as the California partnership, that the surviving partner bought out the interest of the deceased partner.

The Court: We will have to continue tomorrow morning, won't we? I don't want to go past 4:30 tonight, and we can't close up here in fifteen minutes.

(Testimony of Harold S. Anderson, Jr.)

Mr. McHale: Is your Honor going to take a recess now?

The Court: Yes, I will take a recess at this time until 10:00 o'clock tomorrow morning.

(Whereupon at 4:15 o'clock p.m. Thursday, January 28, 1954, an adjournment was taken until 10:00 a.m., Friday, January 29, [89] 1954.)

Friday, January 29, 1954—10:00 A.M.

The Clerk: No. 12044-C Civil, et seq., Anderson v. United States, further trial.

Mr. Bennion: Shall we have Mr. Anderson resumed the stand, your Honor?

The Court: Yes, sir.

H. S. ANDERSON, JR.

called as a witness by and on behalf of the plaintiffs, having been previously sworn, resumed the stand and testified further as follows:

Mr. Bennion: If your Honor please, last evening we were in a little difficulty here about the actual mechanics of the payment of these sums to the estate of the decedent, and I believe we are in position this morning to clarify the matter.

Redirect Examination

By Mr. Bennion:

Q. Mr. Anderson, last night, you testified regarding borrowing some money from a bank. Were you

(Testimony of Harold S. Anderson, Jr.)

able last night to locate in your files any documents connected with that borrowing?

A. Yes, I was. I went to my office last night, and I have with me this morning a true copy of a note in the amount [91] of \$200,000, dated December 22, 1942, payable to the Security-First National Bank of Los Angeles.

This note is signed on behalf of the three partnerships, or the two partnerships, I should say, H. S. Anderson Co., Anderson Brothers Supply Company of Alaska, and for the Anderson Brothers Supply Company of Nevada. The reason I say "for" is the Anderson Brothers Supply Company was a fictitious trade style of H. S. Anderson Company. This note is signed by H. S. Anderson, Jr., a partner, and by R. W. Anderson, a partner.

Q. Does that show that those two signatures are as partners of H. S. Anderson Co.?

A. Under the signing line?

Q. Yes. A. It just has the names.

The Court: Can this note be offered in evidence?

Mr. Bennion: Yes, if your Honor please, we would like to offer the note in evidence.

The Court: You may withdraw it by the filing of a photostat.

The Witness: This is not the original note. That I cannot locate. I don't know what has happened to it. Some 12 years have elapsed since that happened.

Mr. Bennion: The writing on the note in ink, is that your handwriting? [92]

(Testimony of Harold S. Anderson, Jr.)

The Witness: That is my handwriting at that time. That note was signed, as you can see, December 16, 1942.

Mr. McHale: Is this your retained copy of a note that you delivered to the Security-First National Bank?

The Witness: It is.

Mr. McHale: Was it signed by the various persons whose names are typewritten on it?

The Witness: Yes, sir.

The Court: The Government is going to make no objection?

Mr. McHale: No objection.

The Court: Apparently it would be an office copy kept in the regular course of business.

The Witness: Yes.

Mr. McHale: Yes.

The Court: The note will be received in evidence as Plaintiff's Exhibit No. 22.

Q. (By Mr. Bennion): Did you find another document last night?

A. I have a document which is a General Continuing Guaranty form, which is a true copy.

Q. What is the date on that document?

A. The date on this document is December 16, 1942.

The Court: For the purposes of this discussion we will mark this Exhibit 23 for identification. Go ahead. Signed December 16th— [93]

The Witness: 1942, by Cynthia Beal, Attorney in Fact, for J. H. Anderson, by H. S. Anderson, Jr.,

(Testimony of Harold S. Anderson, Jr.)

R. W. Anderson, Gloria S. Anderson, and Ethel H. Anderson, for the partnerships Anderson Brothers Supply Company of Alaska, and H. S. Anderson Company, and Anderson Brothers Supply Company of Nevada.

(The document referred to was marked Plaintiff's Exhibit 23, for identification.)

Q. (By Mr. Bennion): Does that guarantee indicate that it is in connection with any particular borrowing?

A. It indicates it is in connection with the borrowing of \$200,000.

Q. There are the words, "Signed Dec. 16, 1942, H.S.A., Jr.," in ink.

A. That is my notation in my handwriting at that date.

Mr. Bennion: If your Honor please, we would like to offer this in evidence as Plaintiff's Exhibit 23.

The Court: Received in evidence as Plaintiff's Exhibit 23. Let me look at it a minute.

(The document, marked Plaintiff's Exhibit 23, for identification, was received in evidence.)

The Court: J. H. Anderson was your brother who was in the Service?

The Witness: That is correct.

The Court: Who is Cynthia Beal? [94]

The Witness: That is J. H. Anderson, Jr.'s, and my mother, and Robert's mother, who was acting

(Testimony of Harold S. Anderson, Jr.)

as Jack's attorney in fact when he was overseas.

The Court: You knew of your own knowledge that before he went overseas he had given Cynthia Beal a power of attorney to act in his behalf?

The Witness: Yes.

The Court: And Gloria S. Anderson is your wife?

The Witness: Robert's wife.

The Court: And Ethel is your wife?

The Witness: My wife.

The Court: So that the signatures on Exhibit 23 in total constitute the signatures of all the persons who were partners in the new partnership, H. S. Anderson Co., and the new partnership, Anderson Brothers of Alaska?

The Witness: That is correct.

Q. (By Mr. Bennion): Mr. Anderson, I show you Exhibit 2, which is the agreement dated December 11, 1942, and call your attention to the fact that on the last page the signature has the typewritten name, "John Hardy Anderson, by," and then the signature Cynthia Beal as attorney in fact; I also call your attention to Exhibit 3, page 4, and I will ask you whether she signed in the same manner in behalf of John Hardy Anderson, Cynthia Beal, Attorney in Fact, under all of these exhibits, Exhibits 3, 4, 5 and 6. [95]

A. Yes, she did.

The Court: That is your mother's signature?

The Witness: That is my mother's signature.

Q. (By Mr. Bennion): Cynthia Beal was your

(Testimony of Harold S. Anderson, Jr.)

mother, was she? A. That is correct.

Q. And also John's mother?

A. John's mother.

The Court: And Robert's mother?

The Witness: And Robert's mother.

Q. (By Mr. Bennion): Exhibits 3, 4, 5 and 6 are dated December 23, 1942, which is one day after the court approval of the agreement of December 11, 1942; I will ask you whether or not the terms of these exhibits 3 through 6 had been agreed upon between the parties who signed it at a date prior to December 23, 1942? A. Yes, they had.

Q. When had they been agreed upon?

A. These agreements—the terms of these agreements had been agreed on at least four months, I would say, prior to the signing, during the negotiating period which culminated in the signing of the settlement agreement of December 11, 1942. Before my brother, Jack, went overseas he had attended the funeral of my father in December of 1941, he had come down from Sacramento, from Mather Field where he was finishing his [96] flying training, and at that time my brother, Robert, was available, my brother, Jack, was available, my mother was available, Mrs. Cynthia Beal, and we had discussed our partnership and the pros and cons of forming a new partnership and carrying on in this subsistence business, and we had agreed in subsequent months prior to December 11th that these agreements were agreed upon prior to December 11th, the terms of the agreements.

(Testimony of Harold S. Anderson, Jr.)

Q. That was prior to the time that you signed the agreement to pay \$75,000 to the estate?

A. That is correct.

Q. It was understood, then, that these other partners would bear their share of that obligation?

A. Yes, sir.

Q. Otherwise you would not have signed that obligation?

A. I couldn't have afforded to myself. I would not have signed it.

Q. Mr. Anderson, were you able to locate a copy of the voucher regarding the \$141,000 deposit, which was testified about yesterday evening?

A. Yes, I have that voucher dated December 21, 1942, in the amount of \$141,480.05, made payable to H. S. Anderson, Jr., administrator of Estate of H. S. Anderson, deceased.

Mr. Bennion: If your Honor please, may we mark this?

The Court: This will be marked 24, for identification. [97]

(The document referred to was marked Plaintiff's Exhibit 24, for identification.)

Q. (By Mr. Bennion): Was this voucher a copy of a check? Was the top part of this voucher a copy of the check that was drawn to the estate?

A. That is correct. In our system of bookkeeping we use the voucher system; the original of this voucher is the actual check itself, showing the distribution and the detail on the original copy, which

(Testimony of Harold S. Anderson, Jr.)

is the check itself, and then there is a second copy which is an office copy, and the third copy which is this yellow copy, which is the triplicate copy. It represents a true copy of the check itself.

Q. Whose check is it?

A. That is the check of H. S. Anderson Co., H. S. Anderson Company, which company was the new partnership.

Mr. Bennion: If your Honor please, I would like to offer as Exhibit 24 the document marked for identification.

The Court: It will be received in evidence as Exhibit 24.

It is a minor matter, but I am just trying to figure out this \$12,000 item, how this worked in. Let me see. You were drawing a check on the H. S. Anderson Company account?

The Witness: Yes, sir.

The Court: To the estate?

The Witness: That is correct. [98]

The Court: And you were the executor or administrator of the estate?

The Witness: Yes, sir.

The Court: Now, the item says, "Less Balance in Administrator Account." We know from the figures that that \$12,000 was used to make the total \$154,000. I am trying to figure out how that was used.

The Witness: Well, I would say there were other moneys in this estate account, in this administrator

(Testimony of Harold S. Anderson, Jr.)

account, which were being used to pay other estate bills, by me as the administrator.

Q. (By Mr. Bennion): Do you recall where the \$12,000 would have come from?

A. I can't just offhand, no, sir.

The Court: Did you have fees coming as administrator or executor of the estate?

The Witness: No, sir, I waived all fees. I had no fees in connection with the estate.

The Court: It would look offhand—this probably isn't the answer, because your books would be properly kept, but it would look offhand as if you had used estate money to the extent of \$12,000 to pay the three obligations listed.

The Witness: Judge, I am sure that was not the case, but I can't tell you for sure.

The Court: I don't think it was the case, [99] either.

The Witness: I think I would have been remiss in my duty as administrator and would have been called on very quickly.

The Court: Unless there was in the administrator account \$12,000 that by some accounting procedure belonged to you. I wonder if the fact that that \$12,000 was previously deposited to the estate accounts helps us in any way?

The Witness: I would say it was money advanced for the payment of estate bills that had to be paid.

The Court: In other words, if I remember the ledger sheet from the estate account, the estate bank account, which we read yesterday, it showed that

(Testimony of Harold S. Anderson, Jr.)

\$12,000 item as having been deposited to the estate account some days before, before December 22nd?

The Witness: Yes, sir; as I recall it was. I have that bank statement with me.

The Court: What was the account yesterday? I don't know whether we sufficiently identified it. It was the account of the estate of H. S. Anderson?

Mr. Bennion: It was the bank statement of H. S. Anderson's estate.

The Court: It was the account of which he was the administrator?

Mr. Bennion: Administrator.

The Witness: Administrator, yes. [100]

The Court: It was the account that you were carrying on?

The Witness: Excuse me, Judge. The bank statement is in the ledger there, right in front of you.

The Court: Let me see that.

(Documents handed to the court and witness.)

The Court: The account is entitled H. S. Anderson, Jr., special administrator of the estate of H. S. Anderson, deceased.

The Witness: This account was later changed, Judge, to administrator.

The Court: It started out as special?

The Witness: That is correct. I think that is what happened.

The Court: At the time of the transactions in December of '42, the account was H. S. Anderson, Jr., administrator of the estate of H. S. Anderson,

(Testimony of Harold S. Anderson, Jr.)

deceased, it was an account in the Security-First National Bank, and there was a deposit to the account on October 30, 1942, of the \$12,000 item we are talking about shown on Exhibit 24, namely, \$12,533.21. Another interesting thing, this may solve it, this may have been when your account was changed from special administrator to administrator, and the bank instead of merely changing the name of the account probably opened up a new account. You will notice that this deposit of \$12,533.21 shows no balance [101] at the time it was made. So that it was apparently the first deposit in the account, and therefore was a sum of money that came from somewhere deposited to your account as administrator of your father's estate. It shows no prior balance. Let's see if we find any other sheet that shows general. This is all special here.

The Witness: Frankly, it is very vague in my mind after all these years that have gone by.

The Court: On December 31st, '42, the sheet we were looking at, which says, "Administrator of the Estate," wound up with a balance of \$116,000 and some odd cents on December 31st, '42, and it is carried over in the same amount on another sheet called "Special Administrator"; could the \$12,000 have been the opening of the account? Are there any other sheets in '42? There don't seem to be.

Mr. Bennion: I don't know whether this is a pertinent observation, but we could probably trace the \$12,000, but I think it has always been my understanding that this partnership had paid moneys

(Testimony of Harold S. Anderson, Jr.)

into the estate, because that was the only source of moneys for the widow, or for a number of other reasons, to pay expenses with, and that he properly took credit for the \$12,000 which had theretofore been put into the estate.

The Court: I think we can do this, for the purpose of the record, and see what you think, Mr. McHale: The essential questions in this case do not turn around this \$12,000 item. [102] The matters of the settlement of the administrator's accounts were matters for the Probate Court. The law presumes that the law has been obeyed and that transactions were lawfully and regularly carried on, and I think we could presume that this \$12,000 deposited to the estate account was money which came from sources outside of the estate, either H. S. Anderson or H. S. Anderson and his brothers. Don't you think that would follow?

Mr. McHale: I don't think that is an issue in the case, your Honor, anyway. There is no question that they raised this money by borrowing.

The Court: All right.

Mr. McHale: There are a lot of things that flow from this whole situation. For instance, Harold, Jr., and John and Robert were all heirs of the estate, and out of this \$75,000, for instance, they were entitled, I think, to \$37,500, which just flows as a matter of fact.

The Court: Which doesn't have much to do with the issues of the case, though, does it?

(Testimony of Harold S. Anderson, Jr.)

Mr. McHale: I think it might; it might.

The Court: All right. Proceed.

Q. (By Mr. Bennion): Mr. Anderson, some questions were directed to you yesterday by counsel, Mr. McHale, regarding your manager in Alaska, Mr. Rather? A. Mr. Rather, yes. [103]

Q. In the conduct of your business did you maintain supervision over the managers?

A. Very definitely.

Q. Would you explain to the court how you maintained such supervision?

A. Mr. Rather was the project manager in Alaska; we maintained a Seattle office in the Smith Tower Building where we maintained a purchasing agent and a personnel man, a man by the name of Joe Harnish. I would make trips to Seattle on a regular basis, and also on a regular basis to Alaska. I would be in constant communication by telephone to Seattle, and by radio telephone to the job at Anchorage. And our system of accounting provided for daily cash reports, daily force reports, and several other types of reports from the job each day, operating reports, from which I could always get a very good idea of what was going on saleswise and businesswise on the job. As a matter of fact, after about, I would say, approximately 10 months after my father died these reports and other reports that I had heard coming down from Alaska led me to believe that something was a little haywire with Mr. Rather's operations, so I sent a Mr. Ohl, Alfred Ohl, who was an employee of H. S. Anderson Com-

(Testimony of Harold S. Anderson, Jr.)

pany, and a trained public accountant, to Alaska to make an examination of the books, which he did in 1943, and the findings from Mr. Ohl's audit and examination proved beyond a doubt that we must replace [104] Mr. Rather, which we did in 1944, early 1944.

Q. Was that because of shortages?

A. That was because of shortages, and his taking certain liberties with partnership funds.

Q. When you say that you were in constant touch or contact with him, how often, for example, would you telephone?

A. I would say I averaged a call a week to Alaska, and perhaps a couple or three calls a week to Seattle by telephone.

Q. What was carried on at Seattle, did you say?

A. The purchasing and hiring and the personnel work for the Alaska job. All merchandise was purchased at Seattle, and all help was hired at Seattle and Los Angeles, we hired help in our local office here, also.

I might add one further point. I used to travel to Alaska via Air Transport Command on an Army pass.

Q. Was that because you were working on the Army Air Base?

A. Because we were working for the Government, had a Government contract for the Army.

Mr. Bennion: I think that is all, your Honor.

May I just ask this to clear up the record?

Q. (By Mr. Bennion): Mr. Anderson, any testi-

(Testimony of Harold S. Anderson, Jr.)

mony or statements yesterdays regarding payment, other than as reflected by these documents introduced this morning, would you say it [105] was erroneous?

A. I would say so. I think I qualified myself yesterday by saying "Approximately" and "To my best recollection."

Q. Were you speaking from recollection yesterday?

A. Yes. But the documents today show the exact dates that I referred to yesterday. I said December, generally, yesterday, but these documents give the exact dates today in December of 1942.

Mr. Bennion: That is all.

Recross-Examination

By Mr. McHale:

Q. When your father died, Mr. Anderson, did you have any idea at that time of the value of the equipment on hand in the Anderson projects, the California partnership?

A. Yes, the balance sheet reflected certain equipment.

Q. Did that balance sheet reflect the actual value or just the book value as it had been written off?

A. I would say that value represented the depreciated value.

Q. You are aware that revenue agents adjusted that depreciation at the end of 1942, are you not?

A. Yes, sir.

(Testimony of Harold S. Anderson, Jr.)

Q. And increased the value considerably of the assets? A. Yes, sir. [106]

Q. As reflected by Defendant's Exhibit A, reflecting a change in equipment of \$103,000 writing up, and an increase in depreciation reserve of \$55,000, increasing considerably the value of the assets in the business, you are aware of that, are you not?

A. Yes, from this report I am, yes, sir.

Q. You are also aware, are you not, that the State of California placed a value on your father's interest in the partnership at \$75,000 in the California partnership? A. I don't recall.

Q. I am going to show you a certified copy of the inventory and appraisement signed by you and filed in the estate of your father, showing a value of his interest of \$75,000. Do you recall that?

A. Yes, I signed it.

Q. And also a value of the Anderson Brothers Supply Company of Alaska of \$50,000?

A. Yes, sir.

The Court: What was it appraised at?

Mr. McHale: That is the appraised value. I will offer——

The Court: Let me look at that.

(Document handed to the court.)

Mr. Bennion: Mr. McHale, are not those the same values that appear on the estate tax return?

Mr. McHale: I believe they are. I have forgotten now. [107]

The Court: This document that counsel is re-

(Testimony of Harold S. Anderson, Jr.)

ferring to is a photostat of the inventory and appraisal in the estate of H. S. Anderson, deceased, No. 210180, probate matter in the Superior Court of the State of California, Los Angeles County, and when these appraisements are made out, inventory and appraisements are made out, the items are typed in, and ordinarily the amounts are left blank, and then the appraiser comes along and fills in the amounts and makes the appraisal.

Mr. McHale: I think in this file, your Honor, there is a later appraisal.

The Court: So that I would—well, this is a copy of the official appraisal signed by William Daggett, Jr., the appraiser, so I would assume that the document was handed to the appraiser with the amounts blank and the appraiser filled in the amounts. That is the ordinary practice in probate matters. Does that make any difference to you?

Mr. McHale: No. I just want to show the value that Mr. Anderson as administrator accepted in the probate proceedings.

The Court: He doesn't accept anything. He has nothing to do with it.

Mr. McHale: He could contest those matters.

The Court: What probative weight this has I am not sure. If you mean this as an admission by Harold Anderson that these interests were worth that amount of money, I don't think it is an admission, although I am not prepared to say what [108] difference it makes, because Exhibit 2 shows that they paid that amount of money. However, I am

(Testimony of Harold S. Anderson, Jr.)

familiar with probate practice and probate matters, and with the exception of items such as a bond that has a fixed value, or a promissory note with a certain amount due on it, those amounts might be carried over in the right-hand column when the document was handed to the appraiser, and he might accept the amounts you put in, but ordinarily you hand these to the appraiser in blank and he appraises the property and he makes his certificate, "I, the Undersigned, hereby appraise the estate," and ordinarily he sends it back to the attorney and the attorney pays his fee and files it.

But it certainly is not an admission by the administrator who certifies as to values.

You notice the certificate says, "H. S. Anderson, Administrator, being duly sworn, says that the following inventory contains a true statement of all the assets of the estate which have come to his knowledge."

He doesn't state that these are the values. Because actually that certificate which I have just read, and which precedes the inventory, must be filed and sworn to before the appraiser ever appraises. So H. S. Anderson, Jr., signed that certificate on April 14, 1942, the appraiser made his certificate on December 4, 1942.

Mr. McHale: Well, I offer it for the purpose of showing [109] that he does set up an interest in the partnership.

The Court: We have read it into the record. Do you want anything more?

(Testimony of Harold S. Anderson, Jr.)

Mr. McHale: I think if you mark the entire file for identification I will wait until it is my case.

The Court: The probate photostatic file will be marked——

The Clerk: Defendant's Exhibit B for identification.

You might pick out what parts you want, or all of it, at that time.

Mr. McHale: Thank you.

(The document referred to was marked Defendant's Exhibit B, for identification.)

The Court: What we have been talking about is the Inventory and Appraisement contained in Exhibit B, for identification.

Mr. Bennion: Could I have counsel state again the purpose of putting that in?

Mr. McHale: Well, I am not offering it at this time.

Mr. Bennion: Could I have the reporter repeat that, the purpose?

The Court: I can tell you what it was without looking for it.

After we discussed it he said: Then I offer it as an admission on the part of H. S. Anderson, Jr., that there was inventoried an interest in the partnership. [110]

Was that your statement?

Mr. McHale: Yes.

That is all.

Mr. Bennion: Plaintiff rests, your Honor.

(Testimony of Harold S. Anderson, Jr.)

The Court: Are you through with this witness?

Mr. McHale: Yes, your Honor.

The Court: I want to ask a couple of questions.

Mr. Bennion: Fine, your Honor.

The Court: This Exhibit 2 in evidence, which was what we will call the settlement agreement, dated December 11, 1942, paragraph 6, you will note it says, "H. S. Anderson, Jr., as surviving partner of The California partnership, in full satisfaction and discharge of all claims of the estate of H. S. Anderson, deceased, and of the heirs of H. S. Anderson, deceased, for and on account of the interest of said H. S. Anderson in his lifetime and that his estate has acquired since his death in and to the California partnership, hereby agrees to pay into the estate of H. S. Anderson, deceased, the following sums of money:

"(a) The sum of \$75,000 * * *"

You will note, in substance it says H. S. Anderson, Jr., agrees to pay \$75,000.

When you signed this agreement, was it your intention that you were paying that money on your own behalf, or that you were paying that money on behalf of your two brothers and the [111] wives of yourself and Robert Anderson?

The Witness: It was definitely my understanding that I was paying the money out for the partners.

The Court: Meaning the three brothers and the two wives?

The Witness: Yes, three brothers and the two

(Testimony of Harold S. Anderson, Jr.)

wives, which was the limited partnership which we had agreed on prior to the signing of this settlement agreement.

The Court: Similarly in 8, paragraph 8 of Exhibit 2, where it says, "H. S. Anderson, Jr., Robert W. Anderson, and John Hardy Anderson, as surviving partners of The Alaska Partnership," skipping and so forth, "hereby agree to pay into the estate of H. S. Anderson, deceased, the following sums of money:

"(a) The sum of \$50,000 * * *"

was it your intention that you and your two brothers were paying that money solely on behalf of the three of you, or that you were paying that money in behalf of the five persons who became the partners, namely, the three brothers and the two wives?

The Witness: On behalf of the five partners, the two limited partners, the wives, and the three general partners.

The Court: All right.

The Witness: Is that all?

The Court: Anything further?

Mr. McHale: At this time I would like to [112] move——

The Court: You may step down.

Mr. McHale: ——since plaintiff has rested, for a judgment for the defendant on the grounds that plaintiffs have not sustained their burden of proof in this case; firstly, in that the evidence is quite

clear, I think, the agreement, that what was purchased was not specific contracts, but an interest of the decedent in two partnerships, the California and the Alaska partnerships. The documents signed by all the partners and the heirs speak of a fair market value of an interest in both partnerships, and that is all that was sold, if anything was sold.

The Court: What follows from that? At least give it to me in skeleton form.

Mr. McHale: The interest purchased is a capital asset. It is not specific contracts, or an item of property that can be depreciated. An interest is an ownership, like stock in a corporation is a capital asset. It can only be sold or exchanged or liquidated, that is the only way a gain or loss can be realized therefrom. They cannot deduct it as an expense, as they are trying to do out of the earnings in the subsequent years.

That is the first premise that falls from that.

The Court: How does a man get his capital back, then? Let's assume for argument that there was being purchased an interest in the partnership. [113]

Mr. McHale: It remains on the books until they sell it or exchange it or dissolve it. It remains as a capital asset.

Secondly, the evidence doesn't show, I don't think the plaintiffs have sustained their burden of proof to show there were any contracts in existence that had any great value on the date of death.

In the first place, there were purchase orders, two or three of them, in existence when he died, for a camp I think of 600 men. I am speaking of the

Nevada operation. And to provide restaurant or feeding facilities for these men. The purchase orders that comprise the bulk of the business at Basic Magnesium were entered into after the date of death. And by Harold's own testimony right after his father died he went right up in Nevada and had this conference with the various people and asked whether he could go on. And he said he could go on. And it seems to me the testimony is most clear that Harold was an active partner and it was on the basis of Harold's carrying forward this business, which had a going concern value, they had a warehouse on 6th and Alameda, they had an office in Los Angeles, an office in Seattle, they had an office in Alaska, all of which was carried on by managers and by people in the field, a going business which had a fairly large staff of office workers and warehouse people, and so forth.

This wasn't a personal thing like an insurance man who [114] has contracts and so forth. This was a going, operating business and it wasn't dependent on contracts at all. It was dependent upon Harold, Jr., going out and doing the work, and that is what he did in the following year.

So I think when they try to say it was the father's interest in these contracts that they sold, it is wrong. It was as much Harold's and the boys', all three of the boys' joint interest in the other partnership, and the going business, what amounts to a going concern value or good will, which was purchased, if anything.

The Court: I don't follow you on that. Nobody contended that these contract, if they were contracts, belonged to H. S. Anderson, deceased.

Mr. McHale: I think that is the major contention, your Honor.

The Court: These contracts, if they belonged to anyone at all, belonged to the partnership, as far as the California deal was concerned, the partnership composed of the deceased and H. S. Anderson, Jr.

Mr. McHale: But, your Honor, they are saying—and I think this is their contention, but I say the evidence doesn't bear them out—that what they bought were these specific contracts, that is, Harold Anderson, Sr.'s interest in these contracts. And I say the evidence is quite clear, what was Harold Anderson, Sr.'s interest in the partnership, and not [115] any specific partnership property. And the documents are clear.

The documents filed and approved by the Superior Court are clear that all they bought was the interest of Harold Anderson, Sr. And I don't think the testimony shows that they purchased any particular contracts, because there weren't any really valuable contracts in existence.

The Court: Now, wait. On whether they bought the contracts, before we get to that, it seems to me you skip over with a rather light and nimble touch what goes on when a partnership is dissolved. Here was a partnership composed of the father and H. S. Anderson, Jr., taking now just the California partnership; the father dies. Now, I have read both your

memoranda on this partnership law, I haven't studied it completely, but that is what I was doing this morning when I delayed you. I was going over these memoranda again. Here are two partners, a partner dies, that dissolves the partnership; the partnership, however, continues for the purpose of winding up in liquidation, and it did in this case. For almost a year the son carried on the partnership. Now, because the father dies does not mean that the son is then the owner of all the partnership property. The property still, or whatever there is, is still the property of the partnership. The son is only the trustee as a surviving partner, and he has certain duties to wind up, liquidate, pay [116] the liabilities and marshal the assets and so forth. Now, when somebody comes along and buys the partnership interest, buys what the partnership had—and let's not argue now about what they bought—then you have an entirely different situation.

Let's take a couple of examples to see what I am thinking about.

Example No. 1: The father has died, the son is a surviving partner, and X, a stranger, comes in and pays \$75,000 for the interest of the partnership. X then has bought from the partnership whatever the partnership has and becomes the owner as an individual of that property. He doesn't buy it from the son, H. S. Anderson, Jr., as an individual; he doesn't buy H. S. Anderson's interest in it, because as an individual he had no interest, he was a surviving partner, the representative of the partnership. So in example No. 1, X buys everything the

partnership has, but he buys it as an individual from the surviving partner.

Mr. McHale: Your Honor, I think right there he buys his interest, but he doesn't buy the specific assets.

The Court: I say let's pass for the time being what he bought. I am trying to illustrate another point. I may be wrong. Until I get through with my examples you may not see my point.

Now we will take another example, No. 2. The same [117] situation, the father dies, the son a surviving partner, and the son and X decide to buy the interest of the partnership. When the son and X, the stranger, buy the interest of the partnership, the son is acting as a purchaser in his individual capacity, he is acting as a seller in his trustee capacity, and it is a situation exactly the same as if X had bought. The mere fact that the son is buying and that he was the surviving partner doesn't change the legal situation. X and the son, two separate entities, then buy from the partnership.

The third situation: Suppose instead of a stranger being involved, Harold Anderson, himself, the surviving partner, decides to buy out the partnership interest. He then acts in two capacities. As the buyer he acts exactly the same as a stranger would act, except possibly a duty to exercise good faith and not take an unconscionable advantage, and so forth, and so on. But in his capacity as a purchaser he is in no different situation than a stranger. In his capacity as a seller, he is the trustee, the surviving partner.

So there is a sale to—you can say it is being sold to the surviving partner, but actually the partner in one capacity buys and in the other capacity sells.

Now, isn't that the law, so far, as you read these sections?

Mr. McHale: I don't quarrel with your Honor on the law at all. I say all that the person buys is the interest. [118] He doesn't buy the specific assets, because the partnership, as expressed in the statutes, Uniform Partnership Act, is that the partners don't own the specific assets; they just have an interest in the partnership as a whole.

The Court: I don't know where this is going to take us, but I can't now remember the statement that you made that got me off on this alleged analysis of it. You made some statement which made me think that you didn't agree with what I have just stated as the way these sections work.

Now we go a step further here. In the situation at hand it is certainly arguable that when H. S. Anderson, under paragraph 6, paid the \$75,000, and where under paragraph 8 the three boys paid the \$50,000, that they were not buying for themselves, that they were buying for the group. The evidence certainly can be argued to show that: The loan of money, the guarantee that was given, and the immediate formation of the partnerships.

It is true that the bald agreement, Exhibit 2, shows that H. S. was the stranger buying whatever he bought, and that the three brothers in the Alaska case were buying whatever they bought for \$50,000.

Then you finally come down to what you have been wanting to talk about, what did they buy.

Well, what did they buy?

Mr. McHale: They bought the interest of their father in the partnership. [119]

The Court: Not their father.

Mr. McHale: Don't call him the father; call him the deceased partner. They bought his interest.

The Court: They did not buy his interest. I just got through telling you that they bought—whatever it was that they got, it was the interest of the partnership, not of the father or of the son, but collectively whatever interest the partnership had at the time of death is what they bought.

Mr. McHale: They bought that interest, they bought an interest. They didn't buy this contract and that contract and another contract; they bought an interest, and in buying an interest they should set it up on the books as a capital item, and it is not deductible.

The Court: Now we are getting——

Mr. McHale: Let me explain their theory.

Their theory is that they bought, say, the Basic Magnesium contract, and having a limited life they can amortize it over the limited life. But all the documents in the case say they bought the interest. I am not disagreeing that all three of them came in. It doesn't make any difference whether Harold, Jr., bought it, or all three of them. But the point is what they bought. That is the basis of my motion, your Honor, that they haven't sustained their burden of proof.

The Court: Well, let me ask you this: Supposing there was a partnership like this, and all the assets that you can [120] find in the partnership—let me interject, I don't know where this is going to lead me or help me, but I would like to have you view it—supposing they bought the interest of a partnership, and all the assets that you can find when you got through shaking the partnership down was a piece of ground, real property, and a Cadillac automobile. Now, what would follow from that? Obviously the ground is a capital asset, and I don't think we would have any argument about that. If it was eventually sold you would have to determine whether there was a gain or loss on the capital asset. Now, what would you do with the automobile? The same thing?

Mr. McHale: Assuming it was being used for a business purpose, you would depreciate it. But they are depreciating all the physical assets, and the Government allows them all the depreciation on the physical assets. But they are trying to depreciate contracts based on the fact that there was this death. If there hadn't been the death and he had gone on living, and the business would have come to a close in '43 or '44, they wouldn't have been able to depreciate it. But because of this particular situation, that there was a purchase and sale, they say they can depreciate the contracts.

The Court: But you would depreciate the car if it was used for business purposes?

Mr. McHale: Yes.

The Court: Now, suppose instead of a car or

piece of [121] ground there was a contract which expressly said, "This contract shall run for two years," and let's assume that that was the only asset of the partnership that they paid money for; what would you do with that asset? Would you depreciate it over a two-year period?

Mr. McHale: I can conceive of a situation where there could be a particular type of thing, but I would say in the ordinary case no.

The Court: Of course, these contracts are terminable so you don't know when they are going to be terminated. However, to a certain extent you have to look at it with foresight and not hindsight, and under the stipulation if the contract is an asset, it is stipulated that it has a two-year life.

Mr. McHale: You see, your Honor, in this case I think the testimony establishes that this subsistence contracting business was a going concern, as long as it is kept moving and operating, and so forth, it had a definite value, it was making money, and basically what they were buying was, to the extent that the amount paid for the interest didn't represent real assets it represented that going concern value or good will, as it is commonly known.

In the Basic Magnesium situation there were only two or three of these purchase orders on the date of death, if your Honor does find they were binding contracts. The bulk of them [122] were executed after Harold Anderson, Sr.'s, death.

The Court: That doesn't give me a lot of concern. If I find the original purchase orders were an asset, the other purchase orders were in some cases

change orders, and those that weren't were supplements and would not have been issued if it had not been for the original orders. That doesn't bother me too much.

Mr. McHale: Right after he died there was a question whether they would pull out or withdraw, and they said, "We are going ahead."

Who was going ahead? Harold, Jr., was going ahead.

The Court: Actually it was the partnership going ahead clear up to the time of the dissolution of the partnership.

Mr. McHale: It was this going concern that was going ahead. It wasn't done on the basis of Harold Anderson, Sr., having particularly—him particularly having been responsible for it, it was this business, the carrying forward of this going concern, its establishment, its know-how, its method, its employees who were skilled in the business, Harold, Jr., being probably more responsible or as much responsible as his father, according to the testimony. He staked out the camp, had the conferences.

The Court: What is your theory of how the \$75,000 should be treated? The \$75,000 that was paid, of course, did not go into the new partnership. It went to strangers. The [123] new partnership did not have that \$75,000.

Mr. McHale: But the repayment, I think, your Honor—in other words, in the following two years the partnership deducts or attempts to deduct as a business expense the amount necessary to repay this.

The Court: How should they have treated it? Would they ever have gotten that \$75,000 back?

Mr. McHale: No. It is a capital expense. It is an investment. Of course, as any capital expenditure or capital investment, it could be later sold or exchanged or liquidated.

The Court: Yes, if there was anything to sell.

Mr. McHale: That is up to them.

The Court: But supposing the partnership only had a contract and the contract is for not over two years, and the contract is used up, how have they anything to sell? Unless you follow through and say, well, at the end of the two years they could then sell the partnership assets, the partnership assets would then be zero, because the contract has been exhausted, therefore an asset that they paid \$75,000 for they now get nothing. Somewhere along the line you are going to have to give them an offset of that \$75,000, aren't you?

Mr. McHale: No, your Honor. They are purchasing this interest in the business, that has brought them income in these years, that is what they bought it for, the prospect of income. Why did they come in? They had a free choice. [124] They didn't have to come in.

When you buy in any business, you can't expect out of your earnings to pay off your investment, unless they sell or exchange or liquidate the business.

The Court: I don't know about that.

Mr. McHale: You can sell it or exchange it or liquidate it.

The Court: Of course a stock situation is a little different. But if I buy some shares of stock in a company, and if I later sell that stock and make some money, I am going to have to pay on it. And if later on the stock becomes valueless, I am going to certainly claim a loss on it. If I was buying an interest in a business for the purpose of making some money, both by dividends—

Mr. McHale: That is because Congress allows you in that particular instance a specific deduction for that. But that isn't permitted here.

The Court: Are there any cases where people have bought into partnerships and paid, say, a lump sum of money for a 15 per cent interest in a partnership, and then a few years later sold out that interest in the partnership back to the partnership, or to a new partner who was taken in with the consent of all the other partners, where that partner taxwise has been treated?

Mr. McHale: I am sure there are, your [125] Honor.

The Court: Well, without deciding this matter, because I want to do some work on it, I am going to deny your motion at this time.

What I don't know about tax law would fill many, many volumes.

Mr. McHale: We are in a particularly difficult field, your Honor, I will admit that.

I would like to offer that exhibit for identification. I have in here part of the probate file. However, the whole thing has been certified, but it isn't necessary that all of the documents go in.

The Court: Let's take a short recess. Will you be able to finish before noon?

Mr. McHale: Yes, your Honor.

The Court: All right. We will take a short recess.

(A recess was taken.)

The Court: Proceed.

Mr. McHale: I have this part of the probate file, your Honor, which has been certified, but there are only certain documents in there that I wish to offer.

The Court: Just list them.

Mr. McHale: If I can remove them from the certification——

The Court: Yes. Is that satisfactory?

Mr. Bennion: Yes, your Honor. But we——

Mr. McHale: I haven't offered them yet. [126]

The Court: You want to object to them, is that it?

Mr. Bennion: We just would like to have him state the purpose for which he is offering them.

Mr. McHale: I offer from the Superior Court of the State of California, Case No. 210,180, in the Matter of the Estate of H. S. Anderson, also known as Harold Anderson, Deceased, certified copies of certain documents. This file, by the way, is marked Defendant's Exhibit B for identification.

The Court: All right. Copies of what? List them.

Mr. McHale: Petition for Authorization to Continue Operation of Business; the Inventory and Appraisement, Petition for Authority to Execute Release of Partnership Property; Return and Peti-

tion for Order Approving Sale of Personal Property Likely to Depreciate in Value; Petition for Authority to Execute Release of Partnership Property; and Report of Inheritance Tax Appraiser.

All except the last document is offered for the purpose of showing allegations of petitions by the administrator, Harold S. Anderson, Jr., with respect to the purchase of an interest in the partnerships. And the last document, Report of Inheritance Tax Appraiser, I offer because it shows interests of the various heirs in the estate, the valuation of those interests. I think it might be of help to the court to determine the amounts which they derived from the estate.

The Court: All right. Any objection? [127]

Mr. Bennion: We object on the ground that they are irrelevant and immaterial, and they cannot vary the partnership law of California, which we believe that your Honor correctly summarized here a few moments ago, and particularly the characterization by the inheritance tax appraiser would not be binding on the plaintiffs.

The Court: Well, the objection will be overruled. They will be received in evidence. The case is being tried without a jury and I will sort out what is useful and what isn't.

You said you offered some of them to show the purchase of a partnership interest. Of course if you mean that Harold Anderson, Jr., was buying the interest of his father, I think you are all wrong. He was buying the interest that he and his father had had in whatever it was.

Let me see those a minute.

Defendant's Exhibit B received in evidence.

(The document referred to, marked Defendant's Exhibit B, for identification, was received in evidence.)

Mr. McHale: I think your Honor may misconstrue what I mean. But he bought the interest the estate had in the partnership. That is the purpose.

Now, your Honor, I have various returns of the partnership and the individuals. They haven't been offered by the plaintiffs. Maybe they should be in evidence here. I have certified copies which I can offer. That way they will be before [128] the court.

The Court: All right.

Mr. McHale: There is no objection to putting them in, Mr. Bennion?

Mr. Bennion: I have no objection to their going in.

Mr. McHale: I offer the final and amended partnership returns for the period January 1st to December 11th, 1942, for H. S. Anderson Company.

The Clerk: Defendant's Exhibit C.

The Court: Exhibit C received in evidence.

(The document referred to was marked Defendant's Exhibit C, and was received in evidence.)

Mr. McHale: The return for December 12, 1942, to December 31, 1942, for H. S. Anderson Company.

The Clerk: D.

The Court: This was a new company, then?

Mr. McHale. This is after the date of death.

The Court: D received in evidence.

(The document referred to was marked Defendant's Exhibit D, and was received in evidence.)

Mr. McHale: Partnership return for 1943 for H. S. Anderson Company; partnership return.

The Clerk: E.

The Court: Exhibit E in evidence. [129]

(The document referred to was marked Defendant's Exhibit E, and was received in evidence.)

Mr. McHale: And the partnership return for H. S. Anderson Company for 1944.

The Clerk: Plaintiff's Exhibit F.

The Court: F in evidence.

(The documents referred to was marked Defendant's Exhibit F, and was received in evidence.)

Mr. McHale: The partnership returns for the Anderson Brothers Supply Company of Alaska—the two returns are hooked together here—for the period January 1, 1942, and ending December 11, 1942. There are two returns, but one is an original and one an amended return for the same period, your Honor.

The Court: That is the period to December 11th?

Mr. McHale: Yes.

The Court: That will be Exhibit G in evidence.

(The document referred to was marked Defendant's Exhibit G, and was received in evidence.

Mr. McHale: I can't seem to find one for that final few days of that year, but I have one for the year 1943, for the Anderson Brothers Supply Company of Alaska, partnership return.

The Court: Exhibit H in evidence.

(The document referred to was marked Defendant's Exhibit H, and was received in evidence.) [130]

Mr. McHale: And for the same partnership, Anderson Brothers Supply Company of Alaska, partnership return for 1944.

The Court: Exhibit I in evidence.

(The document referred to was marked Defendant's Exhibit I, and was received in evidence.)

The Court: So you are missing a return for the Alaska partnership for the last three weeks in December of '42, December 11th to December 31st?

Mr. McHale: Yes.

The Court: That probably won't make a lot of difference.

Mr. McHale: Two returns, the original and amended return, individual income tax of Harold S. Anderson, Jr., for 1942.

The Court: Defendant's J in evidence.

(The document referred to was marked Defendant's Exhibit J, and was received in evidence.)

Mr. Bennion: Did you say both the original and amended, as one exhibit?

Mr. McHale: Yes.

The individual return for H. S. Anderson, Jr., for the year 1943.

The Clerk: Defendant's K.

The Court: K in evidence. [131]

(The document referred to was marked Defendant's Exhibit K, and was received in evidence.)

Mr. McHale: Individual return for Robert W.—two returns, again, together, original and amended individual return for Robert W. Anderson for 1942.

The Court: L in evidence.

(The document referred to was marked Defendant's Exhibit L, and was received in evidence.)

Mr. McHale: The individual return for Robert W. Anderson for 1943.

The Court: M in evidence.

(The document referred to was marked Defendant's Exhibit M, and was received in evidence.)

Mr. McHale: The individual return for Robert W. Anderson for 1944.

The Court: Defendant's N in evidence.

(The document referred to was marked Defendant's Exhibit N, and was received in evidence.)

The Court: You had no individual return for H. S. Anderson for 1944?

Mr. McHale: No, I don't believe I did, your Honor.

As the next exhibit, the original and amended return for 1942 for John H. Anderson.

The Court: Defendant's Exhibit O in evidence.

(The document referred to was marked Defendant's Exhibit O, and was received in evidence.) [132]

Mr. McHale: The next is the individual return for John Anderson for 1943.

The Court: P in evidence.

(The documents referred to was marked Defendant's Exhibit P, and was received in evidence.)

Mr. McHale: And next is an individual return for John H. Anderson for 1944.

The Court: Q in evidence.

(The document referred to was marked Defendant's Exhibit Q, and was received in evidence.)

Mr. McHale: Next is the original and amended returns for 1942, individual returns, for Ethel Hamilton Anderson.

The Court: Exhibit R in evidence.

(The document referred to was marked Defendant's Exhibit R, and was received in evidence.)

The Court: Now, Ethel is the wife of H. S.?

H. S. Anderson, Jr.: Correct.

Mr. McHale: Next in order is the individual return of Ethel Hamilton Anderson for 1943.

The Court: Exhibit S in evidence.

(The document referred to was marked Defendant's Exhibit S, and was received in evidence.)

Mr. McHale: And the next is the individual return of Ethel Hamilton Anderson for 1944.

The Court: Exhibit T in evidence. [133]

Mr. McHale: Next, two returns, original and amended, of Gloria S. Anderson for 1942.

The Clerk: Defendant's Exhibit U.

The Court: U in evidence.

(The document referred to was marked Defendant's Exhibit U, and was received in evidence.)

Mr. McHale: Next is the individual return for Gloria S. Anderson for 1943.

The Court: V in evidence.

Mr. McHale: And the next is the individual return for Gloria S. Anderson for 1944.

The Court: W in evidence.

(The document referred to was marked Defendant's Exhibit W, and was received in evidence.)

Mr. McHale: I also offer the fiduciary income tax return for the estate of H. S. Anderson, deceased, for 1942.

The Court: Exhibit X in evidence.

(The document referred to was marked Defendant's Exhibit X, and was received in evidence.

Mr. McHale: Those are all the returns that I have. I don't seem to have a couple of them.

The Court: I think you have enough.

Mr. McHale: I thought if this case was going to be submitted on briefs there may be something in the returns that might be of help. [134]

Defendant rests.

The Court: Both sides rest?

Mr. Bennion: Yes, your Honor.

If your Honor please, I think the argument that went on here a moment ago adequately covered plaintiffs' main positions. If I could just take two minutes, though, to make one comment I think maybe it might be helpful, with your Honor's permission.

The Court: Yes.

Mr. Bennion: In the Government's contention that what the plaintiffs bought was an interest in the partnership, the cases that they cited, primarily the Shapiro case and Stilgenbauer case in the Ninth Circuit, had to do with situations where the seller's tax liability was involved, and when a seller sells his interest in a partnership, or his interest in the assets, the question comes up as to whether what he

realizes is ordinary income or capital gain, and it has raised this litigation as to what he sold, whether his interest in the underlying assets or his interest in the partnership, in resolving that issue.

From our standpoint those cases do not decide the question from the standpoint of the purchaser, and I believe your Honor was inquiring about that, and I just wanted to call your Honor's attention to the Nathan Blum case, which was cited in our original pretrial memorandum on page 9, where the [135] purchaser was involved, and the purchaser, if I could just quote two short paragraphs from the Tax Court's opinion——

The Court: Let me have the citation.

Mr. Bennion: 5 Tax Court 702, at page 708, Nathan Blum. This is quoting:

“The parties are in agreement that the transaction between Nathan Blum and his brother, Louis A. Blum, was a sale, but they differ as to the details, the petitioner contending that he bought his brother's partnership interest, and the respondent contending that petitioner bought his brother's interest in the partnership assets. Petitioner's argument is to the effect that gain or loss is realized only upon the sale or disposition of the business as such, not from the disposition of the assets in the course of business.”

Which I understand is practically Mr. McHale's argument here.

The court went on, and I am quoting:

“The result contended for by petitioner, however, does not follow from his premise. His contention ignores the fact, which cannot be denied, that as a result of the transaction between him and his brother he became the sole owner of all the assets of the business, * * *.

“What the Commissioner did in the instant case [136] was merely to allocate Nathan Blum’s cost *proportionately* to the separate assets of the business in the ratio of cost to book value. In doing so, we think the Commissioner acted properly. Petitioner has suggested no other method of allocation which he has demonstrated to be more proper. * * *”

So it is our view of the law that this partnership interest which the decedent owned prior to his death, under the law of California that partnership is dissolved, and for the Government to say that these five new partners bought his partnership interest, there was no such thing in existence. There was no such asset which they can later buy or sell.

As I understand Mr. McHale’s argument, it is that we will recover our basis if we later sell or exchange that partnership interest. But that partnership interest ceased upon the death of the decedent, and we take the position, in line with this Blum case, that from the standpoint of the purchaser, regardless of what tax problems the seller might have the purchaser allocates and has to allocate his cost among the various assets that he buys, and it is im-

material whether there was one purchaser or more. If Mr. Anderson had bought it himself you would have the same situation as the Blum case. We don't think it makes any difference whether there are three or four joining together to buy the assets.

The Court: Going back to what I said about the three [137] examples, in reading over these documents and thinking about it, I have trouble trying to find out just what was done.

The agreement, Exhibit 2, purports to pay money for the interest of H. S. Anderson, Sr. Of course, the entire probate proceedings proceeds on that theory. Query, under California law whether you can buy the interest of a partner in a partnership which has been terminated by death. There is actually no partnership in existence in the sense of there being one in which you can buy an interest. It is true the thing continues for the purpose of liquidation.

Mr. McHale: Your Honor, I was going to say the partnership isn't terminated; it is only dissolved. It is continued with the estate as a partner with the consent of the partner. H. S. Anderson, Jr., represents the estate and represents the partnership. The section of the law, 2496 Civil Code, says:

“Retirement, death, or insanity of a general partner dissolves the partnership unless the business is continued by the remaining general partners * * * (b) with consent of all members.”

It was continued.

Mr. Bennion: Oh, no.

The Court: When you get the consent of all members, then actually you have a new partnership formed.

Mr. McHale: He is the only member left. He is it.

Mr. Bennion: If your Honor please, Section 15042 of the [138] California Corporations Code—it was a different section in the prior Civil Code, but the same provision—deals with the rights of the retiring partner or estate of deceased partner, and I think the language in those documents was put there by lawyers who were familiar with this statutory language:

“When any partner retires or dies, and the business is continued under any of the conditions set forth in Section 15041 * * * without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained”——

In other words, at the date of death.

“and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership;”

Then it goes on in Section 15043 to say:

“The right to an account of his interest shall [139] accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the personal partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.”

My interpretation of that is that when a partner dies his legal representative is entitled to have his interest at that date valued and determined, and that whoever continues the business, whether it be a surviving partner or anyone else, must account to his legal representative for an amount equal to that value.

Now, it is our contention that under the law of California whatever intangible partnership interest there existed prior to death was dissolved by death, and that this does not determine what you do with the money you pay. The purchaser has actually paid out money; now taxwise what does he do with it?

The interest that Mr. McHale keeps speaking about has dissolved by death, and it is the specific assets underlying that interest prior to death, but which are the only assets existing after death, which they acquire as the result of the payment. And those assets, as Mr. McHale states, some of these assets were tangible equipment. If a partner died, let us say, with a million dollars of tangible equipment, certainly the person continuing the business and paying one [140] million dollars would be entitled to recover his million dollars through depreciation

of that equipment. You wouldn't say, well, that is purchase of an interest, some intangible here which is dissolved. And we say that is exactly the situation here. These contracts were as much assets as the car that your Honor spoke of, or as a building; that those were the assets that were purchased and paid for, and the only way that we can recover our capital taxwise is through amortization over the life of those contracts.

The Court: What bothers me now is this: Assume the partnership was dissolved by death and that H. S. Anderson, Jr., continued as sort of a trustee for the purpose of liquidation. Assuming for argument your contention that what there was to be were these contracts, when the \$75,000 was paid to the estate it was to represent the 75 per cent interest which H. S. Anderson, Sr., had in the contracts——

Mr. Bennion: That is correct.

The Court: ——as a matter of logic, then, at that time and prior to the purchase, H. S. Anderson, Jr., had 25 per cent interest in the same contracts.

Mr. Bennion: That is correct, your Honor.

The Court: Where does that lead us to?

Mr. Bennion: If I could follow that down: In other words, when they negotiated they placed the value of \$100,000 on these contracts, but they said Harold, Jr. already owns [141] 25 per cent, so we will pay 75 per cent for the three-fourths belonging to the estate, and the three boys would each pay one-third of that. As a result when the transaction was over Harold, Jr. owned 50 per cent, and you will

observe in that new partnership he owned half of it, and each of the other two brothers owned one-fourth. In other words, they each purchased and each paid \$25,000, with the adjustment for their wives. But Harold and Ethel together owned 50 per cent, and Robert and Gloria owned 25 per cent, and John himself owned 25 per cent. So that the 25 per cent interest which Harold owned from the beginning remained his all through this mutation.

The Court: Then according to your theory, what did the brothers and their wives buy? Is it your contention that Robert and his wife put up \$25,000?

Mr. Bennion: Yes, your Honor.

The Court: Which went into the estate?

Mr. Bennion: Paid it into the estate to buy assets.

The Court: And got therefor a 25 per cent interest in the new partnership?

Mr. Bennion: That's right.

The Court: And that John and his wife put up \$25,000?

Mr. Bennion: John was not married, but he put up \$25,000 to buy assets, and they all five joined together in a new partnership. [142]

The Court: And then did H. S. also put up \$25,000 to add to the 25 per cent he already had?

Mr. Bennion: That's right. And they went from there into a new partnership.

They didn't buy any interest in a partnership. They put their capital in and formed a partnership, and the capital they put in was used to buy these contracts, these assets.

The Court: You don't have any proof in the record how this \$75,000 was split up between the boys, as I recall, do you?

Mr. Bennion: It is my recollection that Harold, Jr., testified that the \$75,000 when it was paid was charged proportionately on the books to the partners. That is my recollection of the thing. That is how it actually was done.

Mr. Harold S. Anderson, Jr.: That is correct.

The Court: Do you recall that in the record?

Mr. McHale: I don't recall, your Honor.

The Court: Well, we will reopen the case for that purpose. We will ask the question right [143] here.

HAROLD S. ANDERSON, JR.

recalled as a witness, having been previously sworn, testified further as follows:

The Court: Mr. Anderson, with reference to the \$75,000 paid to the estate of your father, do you know how that was eventually distributed among the brothers and their wives, who actually were the ones that paid that money ultimately?

The Witness: Your Honor, the wives, Ethel Anderson, my wife, contributed her separate income, her separate property in the amount of \$7500; Gloria Anderson, my brother Robert's wife, contributed her separate capital, cash capital, to the new partnership, to the extent of her interest, which I believe was \$3750, representing her interest in the new partnership; I contributed my capital through my ownership in the assets or the capital that was

(Testimony of Harold S. Anderson, Jr.)

mine through my ownership in the partnership; and my brothers Jack and Bob the same way, and adjustments were made to the respective capital account showing their contribution.

The Court: In other words, as far as you were concerned, as far as the \$75,000 was concerned—does Exhibit 16 show money due you?

Mr. McHale: It shows that he owed the partnership money, your Honor.

The Court: What is that?

Mr. McHale: It shows that he owed the partnership \$2,083.99. [144]

The Court: I understand what you mean by the wives; was there an amount of money out of the \$75,000 for which each of the brothers became liable and eventually paid, which brought the total interest of each brother, of your brother Bob, take him for instance, up to \$25,000?

The Witness: Yes, sir.

The Court: And your brother John had what—twenty-five?

The Witness: Twenty-five thousand, twenty-five per cent.

The Court: Then did you in addition to the twenty-five per cent interest in the contracts, which you claimed came to you on the dissolution of the partnership, did you also put up an additional \$25,000?

The Witness: To build my interest to 50 per cent, or 50 per cent less my wife's contribution. Together ours made 50 per cent.

(Testimony of Harold S. Anderson, Jr.)

The Court: So that your contention is that of the \$75,000 paid to the estate, actually \$25,000 of that—the burden of \$25,000 of that was borne by you and your wife.

The Witness: Yes.

The Court: 25 per cent by Robert and his wife?

The Witness: Yes.

The Court: And 25 per cent by John.

The Witness: Right. [145]

The Court: Any question about that? Any cross-examination?

Cross-Examination

By Mr. McHale:

Q. Out of the \$75,000 paid to the estate, you and your two brothers were entitled from the distribution of the estate to \$37,500, were you not?

A. As heirs?

Q. Yes. A. Yes.

Mr. Mackay: When the estate was distributed, of course, as an heir he got his share.

The Court: I don't see that that has any significance. It is true that is the way it worked out, but what difference does that make?

Mr. McHale: I think there has always been in this case the concept of buying and selling, but I think there is this: that at least one-half of this these boys inherited as part of the estate. We haven't stressed that point, but I think your Honor can see that they do have one-half interest, they go through the elaborate arrangement whereby the

surviving partners purchase from the estate the interest, and from the estate they rebuy the interest in the partnership.

The Court: While their father was alive they had absolutely [146] no existing rights because of the fact that they were heirs, no specific rights to any property; they were merely potential heirs should he pass away, up to that time. After his death it is true they became, as heirs, entitled to a certain interest. But I can't see how that would make any difference.

Mr. McHale: I am trying to point up the fictitious nature of this entire transaction where they are taking assets which have no basis in the father's hands and trying to deduct them from future income.

Mr. Mackay: Mr. McHale, you talk about fictitious nature; when Uncle Sam collected the tax on the estate, the estate tax on the estate, the value was determined upon, and it was paid, and they as heirs got their share. It is not a fictitious deal at all.

The Court: I am going to ask you to brief this for me. I am going to ask you to pull together what you have out of your pretrial memoranda, and have in mind the evidence that has been taken. And I think you probably had better have the transcript written up, hadn't you?

Mr. McHale: I think that is essential.

The Court: Because probably whatever way this goes you will want it to go further.

Let's have your transcript written up and have briefs filed, and make them as concise as you can.

I think the trial has pointed up the problems, what was [147] bought and what was sold.

I take it both sides rest? Both sides now rest?

Mr. McHale: Defendant rests.

Mr. Bennion: Plaintiffs rest.

The Court: How long will it take you to get this transcript out, Mr. Reporter?

(Discussion had off the record.)

The Court: How much time do you want for briefs?

Mr. Bennion: I think we can get one out in 15 days.

Mr. McHale: We can get one out 15 days after it is filed.

The Court: All right. 15 and 15 after the transcript is filed. You may want a reply brief and you may not. You can decide on that later.

Mr. Bennion: We would like an opportunity to reply.

The Court: All right, 5 days for the reply brief. Then unless I order an oral argument on it, it will then stand submitted. I may want it argued.

On this matter of good will I want to make one other observation. It is pretty hard for me to see where good will is involved at all in the Anderson type of business: If I am running a peanut stand and I run it on a sidewalk corner for ten years, there are a certain number of people that know that I serve good peanuts that will stop by and buy from me. That is what I would call good will. The Anderson Brothers would have starved to death if they

operated that kind of a business. [148] Nobody dropped into their warehouse and said, "Will you furnish a bed for me, or a meal?" Their business consisted essentially of feeding and lodging contracts, using contracts in the very loose sense of the word. The essential thing involved in that type of business was, first, the know-how to conduct that kind of a business; secondly, the ability to know how to get these purchase orders through Government agencies, which I imagine involved some knack of knowing the ropes, and then getting one of these purchase orders and continuing through with it and making some money.

This particular purchase order for Basic Magnesium, it is true, gave them a certain item per man over the life of the contract, which in itself wasn't a big item, I think that ran to \$10,000 more or less over the contract, but what it did in substance was to give them the right to sell meals and rent rooms on a large scale basis, and they were in substance feeding and housing a small city.

Now, if an operation is economically handled with cost controls and all, there is no reason why money couldn't be made, because there is no—I was going to say there is no limitation on costs. The prices of meals were not fixed by those purchase orders, were they?

Mr. H. S. Anderson, Jr.: No.

The Court: Some control was exercised by the company; I suppose you had to submit price [149] lists?

Mr. H. S. Anderson, Jr.: That is correct, subject to their approval.

The Court: So the Anderson Company could at all times sell meals to make a profit.

If they were going in the hole, all they had to do was go in and present an increased price list and they were still in business.

In fact, this other case that I tried demonstrated more clearly than this how that was handled. There were changes from time to time on the stated price list.

Now, what part of that is good will? It is pretty hard for me to see where any of it is good will. Unless you want to say that possible contacts which the Andersons might have had with Government agencies or with firms that they had dealt with previously, or new persons, was good will. It is certainly not the type of good will that is understood in the common meaning of the word. When I go in to buy a business and the fellow says, "I have been in business here for twenty years, I have never sold less than so much a year, people all up and down the street know I have done business right around this corner, there are people who come from miles around and don't even know my name, but know where I am located, that look me up and they know that I handle this particular type of commodity"—that prospect of new business coming in, new business coming in without having to go out [150] after it, is what I would think is good will. The Anderson business didn't come that way. You had to go out after it and get it, and then nurse

it along. So offhand it is pretty hard for me to see where there is any good will involved in the case.

Now, whether or not plaintiffs' contention is correct that they can take the amount of money that was paid and then allocate it is another question. Certainly it would be fair to make a finding that the Anderson Brothers would not have paid the \$125,000 if it had not been for the subsistence deals then existing at San Luis Obispo, Camp Roberts—and what is the other one?

Mr. H. S. Anderson: Basic Magnesium, Douglas, and Calship.

The Court: I don't think there is any doubt but what a person could look at this balance sheet——

Mr. McHale: Your Honor, we have a balance sheet in that shows an interest of \$71,000 of H. S. Anderson, Sr., Exhibit A.

The Court: It shows what?

Mr. McHale: An interest of \$71,601.81.

The Court: As being the capital investment of H. S. Anderson?

Mr. McHale: Yes.

The Court: All right.

Mr. McHale: We say that they had undervalued on their books their equipment and their assets.

The Court: Let's assume for argument that your statement Exhibit A does show that, would you seriously argue that if there had not been the two Post Exchange deals, the Basic Magnesium, the Calship, and Douglas, that if there would have been none of this feeding or clothing operation going

on or being started, do you seriously argue that the brothers would still have paid \$125,000 cash for what they did pay for?

Mr. McHale: On our balance sheet it would be a liquidated value of \$71,000. We say good will is more than just the name and reputation. It is the going concern value.

I tried to point it up in my questioning of the witness, that this was definitely a going concern and as such had a value. I think economists would say good will is more than reputation. It is a going business, the earning power of an established and going business.

Accountants when they say someone purchases an interest in the business which has more value than the actual value of the assets, that additional value is almost always allocated to good will and represents that possibility of future earnings.

The Court: Well, if it wasn't a very cowardly thing to do I would just decide the case and shoot it along to the [152] Circuit, because I don't know that I am going to be able to solve this correctly.

Well, thank you for your assistance, counsel, in cutting down the trial of this case, and your courtesy in handling it.

Mr. Bennion: Thank you, your Honor. [153]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 12th day of February, A. D. 1954.

/s/ SAMUEL GOLDSTEIN,
Official Reporter.

Received February 15, 1954.

[Endorsed]: Filed June 1, 1955. [154]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 104, inclusive, contain the original

Complaint;

Answer;

Interrogatories by Defendant;

Answers to Interrogatories;

Stipulation of Facts;

Memorandum of Decision;

Stipulation;

Plaintiffs' Objections to Findings of Fact &
Concls. of Law;

Findings of Fact & Conclusions of Law;

Judgment;

Notice of Appeal;

Plaintiff-Appellant's Designation of Contents of Record;

Defendant-Appellee's Counter-Designation of Contents of Record;

which, together with a full, true and correct copy of the Minutes of the Court had on September 14, 1953, January 28, 1954, January 29, 1954, June 30, 1954, and March 18, 1955; 1 volume of Reporter's Transcript of Proceedings had on January 28 & 29, 1955; and Plaintiff's exhibits 1 to 24, inclusive, and Defendant's exhibits A to X, inclusive; all in said cause,

constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$5.60, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 24th day of June, 1955.

[Seal]

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 14796. United States Court of Appeals for the Ninth Circuit. H. S. Anderson, Jr., Appellant, vs. United States of America, Appellee. Ethel H. Anderson, Appellant, vs. United States of America, Appellee. Robert W. Anderson, Appellant, vs. United States of America, Appellee. Gloria S. Anderson, Appellant, vs. United States of America, Appellee. John Hardy Anderson, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: June 25, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14796

H. S. ANDERSON, JR., et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY

Preliminary Statement

At the time of his death on December 27, 1941, H. S. Anderson, Sr., was a member of a California partnership which was engaged in the subsistence business. His death admittedly dissolved the partnership. The decedent's interest in the partnership had no book value at the time of his death, but had a fair market value of \$75,000.00, the uncontradicted evidence establishing that such value was attributable to certain contracts owned by the partnership at the date of death (the principal contract being for the furnishing of subsistence to workers in connection with the building of the Basic Magnesium plant in Nevada) said contracts having a stipulated life of two years at the date of decedent's death. The five plaintiff-appellants agreed to pay the sum of \$75,000.00 to the decedent's estate. They took over

the operation of said business, and out of the income therefrom they paid to decedent's estate the agreed sum of \$75,000.00. Decedent was also a member of an Alaska partnership at the time of his death, and the five plaintiff-appellants purchased from his estate the decedent's interest therein for the sum of \$50,000.00.

Statement of Points

The District Court erred in the following respects:

A. California Partnership.

1. In concluding as a matter of law that the purchase price (\$75,000.00) should not be apportioned among the specific assets acquired.

2. In concluding as a matter of law that the sums paid (aggregating \$75,000.00) are not deductible as expenses, and are not amortizable or depreciable over the two year life of the contracts (to wit, 1942 and 1943).

3. In finding as a fact that “* * * decedent had an interest in the California partnership in excess of \$71,000.00, without the alleged contracts being listed as assets” at the time of his death. This error is based primarily upon the following two errors:

A. Failure of the Court to find as a fact that at the time of his death, the California partnership had a liability in favor of decedent in the amount of approximately \$29,000.00,

which amount was paid to his estate in addition to the \$75,000.00, and which amount was not part of the value of decedent's capital interest (which had no value) in said partnership.

B. Failure of the Court to find as a fact that whatever, if any, value decedent's interest in said partnership had at the time of death, was allocable to partnership assets was depreciated by approximately 50% (basis two-year life) between the date of death (December 27, 1941), and the date of purchase (December 12, 1942), three-fourths of which depreciation was allocable to decedent's interest.

4. In finding as a fact that various partnership subsistence contracts had no substantial value, and only a small percentage of the value to the partnership (\$100,000.00) contended for by plaintiff-appellants.

5. In finding that \$4,000.00 was paid for goodwill or going concern value.

6. In finding that the amount of \$75,000.00 was not paid to purchase specific assets.

B. Alaska Partnership.

1. The Court made the same errors with respect to \$10,561.30 of the purchase price paid in connection with the Alaska partnership, that being the amount by which the purchase price of \$50,000.00 exceeded the book value of decedent's interest in

said Alaska partnership at the date of his death (\$39,438.70).

Dated: July 20, 1955.

MACKAY, McGREGOR,
REYNOLDS & BENNION,

By /s/ A. CALDER MACKAY,
/s/ ADAM Y. BENNION,
/s/ STAFFORD R. GRADY,
Counsel for Appellants.

Service of Copy acknowledged.

[Endorsed]: Filed July 22, 1955.

[Title of Court of Appeals and Cause.]

STIPULATION RE DESIGNATION,
PRINTING AND USE OF RECORD

It is hereby stipulated by and between counsel for the respective parties hereto as follows:

1. The entire record, as certified to this Court by the Clerk of the United States District Court is material to the consideration of the appeal.

2. The following portions of the record as certified shall be included in the printed record:

a. Complaint in H. S. Anderson, Jr. v. United States of America (No. 12044-C Civil in the United

States District Court) filed on August 4, 1950, including all exhibits attached thereto.

b. Answer in said action filed on or about January 10, 1951.

c. Interrogatories by defendant filed in said action on December 13, 1951.

d. Answer to interrogatories filed in said action on March 10, 1952.

e. Stipulation of Facts, filed in said action on January 13, 1954.

f. Stipulation filed in said action on June 30, 1954.

g. Transcript of record of proceedings had on the 28th and 29th days of January, 1954, beginning at page 1 and ending at page 154, together with the following exhibits only: 2, 16, 17 and A.

h. Memorandum of decision filed in said action by Judge James N. Carter on June 30, 1954.

i. Findings of Fact and Conclusions of Law filed in said action by Judge James M. Carter on March 18, 1955.

j. Judgment entered in said action on March 22, 1955.

k. Notice of Appeal filed in said action on May 20, 1955.

l. Minutes of the Court of September 14, 1953; January 28, 1954; January 29, 1954; June 30, 1954; and March 18, 1955.

m. Statement of Points Upon Which Appellants Intend to Rely, dated July 20, 1955.

n. This Stipulation Re Designation, Printing and Use of Record.

3. All portions of the record as certified by the Clerk of the United States District Court which are not included in the printed record, as indicated above, may be referred to by either party in briefs or argument, the same as if said portions had been part of the printed record.

4. The record as designated herein concerning the case of H. S. Anderson, Jr. v. United States of America (No. 12044-C Civil in the United States District Court) may be used in the following companion cases with the same force and effect and to all intents and purposes as though a duplicate of said record had been designated, printed, served and filed in each of said companion cases:

1. Ethel H. Anderson v. U.S.A., No. 12045-C, Civil, U. S. District Court.
2. Robert W. Anderson v. U.S.A., No. 12046-C, Civil, U. S. District Court.
3. Gloria S. Anderson v. U.S.A., No. 12047-C, Civil, U. S. District Court.
4. John Hardy Anderson v. U.S.A., No. 12048-C, Civil.

Dated: July 20, 1955.

MACKAY, McGREGOR,
REYNOLDS & BENNION,

By /s/ A. CALDER MACKAY,

/s/ ADAM Y. BENNION,

/s/ STAFFORD R. GRADY,

Counsel for Appellants.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States At-
torney,

/s/ EDWARD R. McHALE,
Counsel for Appellee.

[Endorsed]: Filed July 22, 1955.

No. 14796.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. S. ANDERSON, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ETHEL H. ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ROBERT W. ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

GLORIA S. ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JOHN HARDY ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeals From the United States District Court for the
Southern District of California, Central Division.

BRIEF FOR APPELLANTS.

MACKAY, MCGREGOR, REYNOLDS & BENNION,

A. CALDER MACKAY,

ADAM Y. BENNION,

STAFFORD R. GRADY,

523 West Sixth Street,

Los Angeles 14, California,

Counsel for Appellants.

FILE

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PAUL P. O'BRIEN, CLE

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vs.

UNITED STATES OF AMERICA,

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JOHN HARDY ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeals From the United States District Court for the
Southern District of California, Central Division.

BRIEF FOR APPELLANTS.

Jurisdiction.

Deficiencies in Federal income taxes for the calendar year 1943 having been assessed against and collected from appellants in February and March, 1947 [R. 8 and 29],

each of the appellants on December 28, 1948, filed with the Collector of Internal Revenue at Los Angeles, California, a claim for refund thereof. [R. 8, 30, 15-21.] The claims were disallowed by the Commissioner of Internal Revenue by registered notices dated August 29, 1949. [R. 8-9, 27-8, 30.] The complaints for recovery of the alleged overpayments of income tax and interest, with copies of the claims for refund attached as exhibits, were filed with the United States District Court for the Southern District of California, Central Division, on August 4, 1950. [R. 3-28.] The five causes, involving the identical issue, were consolidated for trial below, and are presented here on appeal on the record in one of the five cases by stipulation. [R. 271.]

On June 30, 1954, the Court below entered its Memorandum of Decision [R. 59-68]; and on March 18, 1955, the District Court filed Findings of Fact and Conclusions of Law [R. 71-92] and entered Judgments dismissing the complaints. [R. 92-100.] The Notices of Appeal were filed by appellants on May 20, 1955. [R. 100-106.]

The claims for refund were filed under and within the two-year period prescribed by Section 322 of the Internal Revenue Code. (26 U. S. C. 322.) The complaints were filed in the District Court within the two-year period prescribed by Section 3772(a)(2) of the Internal Revenue Code (26 U. S. C. 3772(a)(2)), and pursuant to the authority contained in Title 28, Section 1346(a)(1), of the United States Code. The taxes in controversy were paid to Harry C. Westover, the then Collector of Internal Revenue, but who was not in office as Collector of Internal Revenue when these actions were commenced. [R. 4, 28.] The appellants are residents of the County of Los Angeles, California, within the judicial district

in which the complaints were filed, as required by Title 28, Section 1402(a), of the United States Code. [R. 3, 28.] From the adverse final Judgments of the District Court, appellants have appealed to this Honorable Court, the jurisdiction of which rests upon Title 28, Section 1291, of the United States Code.

Summary Statement of the Case.

1. Three of the appellants, plaintiffs below, Harold S. Anderson, Jr., Robert W. Anderson, and John Hardy Anderson, are adult sons of Harold S. Anderson, Sr. Ethel H. Anderson is the wife of Harold S. Anderson, Jr., and Gloria S. Anderson is the wife of Robert W. Anderson, these wives being the other two appellants.

2. Harold S. Anderson, Sr., died intestate on December 27, 1941. Prior to and on the date of his death he was a member of a co-partnership (hereinafter referred to as the California partnership) consisting of himself and his son, H. S. Anderson, Jr., one of the appellants, in which Harold S. Anderson, Sr., the decedent, owned a 75% interest and H. S. Anderson, Jr., owned a 25 per cent interest. The business of the co-partnership consisted of subsistence contracting work (feeding and housing defense workers) and was conducted in the States of California and Nevada under the name of "H. S. Anderson." The California partnership was organized on January 1, 1938, by virtue of an oral agreement between the decedent and H. S. Anderson, Jr., which contained no provision for continuance of the partnership in the event of death of one of the partners. [R. 74-5.]

3. After almost a year of arms-length negotiation between H. S. Anderson, Jr., both in his capacity as administrator of his father's estate and as the surviving

partner of the California partnership, and the widow of the decedent (who was the stepmother of H. S. Anderson, Jr.), H. S. Anderson, Jr. agreed to pay into the decedent's estate the sum of \$75,000.00, representing the fair market value at the date of his death of the decedent's interest in the California partnership, together with the sum of \$228,369.32, representing the estate's share of the profits of the California partnership from the date of death to the date of the agreement (to wit, December 11, 1942). The actual language of the agreement in this respect was as follows [Ex. 2, R. 117-8, 77-8, 173]:

"6. H. S. Anderson, Jr., as surviving partner of the California Partnership, in full satisfaction and discharge of all claims of the estate of H. S. Anderson, deceased, and of the heirs of H. S. Anderson, deceased, for and on account of the interest of said H. S. Anderson in his lifetime and that his estate has acquired since his death in and to the California Partnership, hereby agrees to pay into the estate of H. S. Anderson, deceased, the following sums of money:

"(a) The sum of \$75,000.00, representing, as the parties hereto agree, the fair market value at date of the death of the decedent, of his interest in said California partnership;

"(b) The sum of \$228,369.32, representing, as the parties hereto agree, the estate's share of the profits of the California Partnership from the date of the death of the decedent, December 27, 1941, to the date of this agreement."

4. On the date of the decedent's death the California partnership was obligated to the decedent for advances made by him in the sum of \$29,013.36, and these advances were repaid to his estate—in addition to the sum

of \$75,000.00 hereinabove referred to, the agreement of December 11, 1942 providing as follows in this respect [R. 121]:

“11. It is recognized and agreed by all of the parties hereto that at the date of death of decedent, The California Partnership was obligated for advances made by H. S. Anderson, deceased, in the amount of \$29,013.36.

“It is further understood and agreed that the said sum of \$29,013.36, owed to the decedent at the date of his death by The California Partnership was community property and that the same shall be paid into the estate by the surviving partner, H. S. Anderson, Jr.”

5. Said agreement of December 11, 1942, was approved by the Superior Court of the State of California in and for the County of Los Angeles, sitting as a court of probate, on December 22, 1942. [R. 79.]

6. The amounts specified in the agreement were duly paid into the estate of the decedent. Prior to signing the agreement it had been understood by the five appellants that they would join together in the formation of a new limited partnership to carry on the business. This was done. The three brothers borrowed money from a bank in order to make the payment of \$75,000.00, the note being signed on December 16, 1942 and secured by a continuing guarantee signed by all five appellants. The sum of \$75,000.00 was actually paid into the estate by the five appellants on or about December 21, 1942; and they were credited with their respective shares of the payment on the books of a new limited partnership which was created on December 23, 1942, for the purpose of carrying on the business. [R. 206-211; Exs. 22, 23.] The

interests of the five appellants in the limited partnership were: Harold 42.5 per cent and his wife Ethel 7.5 per cent (or 50 per cent between them); Robert 21.25 per cent and his wife Gloria 3.75 per cent (or 25 per cent between them); and John 25 per cent. [Ex. 3.] The sum of \$75,000.00 was deducted by these five individuals in computing their net incomes for the years 1942 and 1943 in these relative proportions, one-half in each year. The deductions were disallowed by the Commissioner of Internal Revenue, as a result of which income tax deficiencies were paid, a portion of which is sought to be recovered in these actions.

7. On the date of decedent's death the California partnership was engaged in subsistence work at Camps San Luis Obispo and Roberts, California Shipbuilding Yards, Douglas Aircraft Plant, and Basic Magnesium, under contracts or purchase orders which had stipulated economic useful lives of two years from and after December 31, 1941. [R. 53-5.] These contracts and purchase orders had no cost and hence did not appear as assets on the books of the partnership.

8. The liability due the decedent in the sum of \$29,013.26, as aforesaid, was actually the amount to his credit in his capital account on the books of the partnership at the date of death, and, pursuant to the understanding with the surviving partner, H. S. Anderson, Jr., was treated as a liability of the partnership instead of capital. In other words, since the decedent had contributed both services and capital, whereas the son had contributed

only services, the agreement between them was that the money contributed by the decedent would be treated as a liability and repaid to the decedent. The result was that there was no net worth or net asset value on the partnership books, the liabilities equalling the assets. [Ex. 16, R. 127, 177-8.]

9. The appellants filed their claims for refund alleging that the sum of \$75,000.00 was deductible either as an ordinary and necessary expense, or, in the alternative, if the payment should be capitalized, it should be treated as the cost of said contracts and purchase orders having a two-year life at date of death of the decedent, and the amount paid should be amortized over the two-year period, which would be 1942 and 1943. [R. 19.] Taxwise, the result would be the same in either event. The Commissioner disallowed the claims, as heretofore stated.

10. When he died the decedent was a member of another partnership, known as the Alaska partnership, he having a 40 per cent interest therein, Robert 30 per cent, John 20 per cent, and Harold, Jr. 10 per cent. [R. 75.] In the agreement of December 11, 1942, the three sons, as surviving partners, agreed to pay into the estate of the decedent the sum of \$50,000.00 in a manner similar to the \$75,000.00 payment. The Alaska partnership was engaged in subsistence contract work in connection with the construction of the air base at Anchorage, Alaska, pursuant to a contract with the War Department, the useful economic life of which was two years from and after December 31, 1941. [R. 53, 55.] Inasmuch as

there was a net asset value on the books of the Alaska partnership on the date of death, the decedent's capital account showing an investment of \$39,438.70, appellants contend that they are entitled to a deduction on account of the \$50,000.00 payment only to the extent that it exceeds the sum of \$39,438.70, or only \$10,561.30. [Ex. 17, R. 128.]

11. The values of the decedent's interests in the two partnerships on the date of his death were taxed as part of his gross estate. The expectation of profits to be derived from the contracts and purchase orders was realized, for the California business in the years 1942 and 1943 resulted in income of \$275,000.00 and \$185,000.00, respectively, while the Alaska business resulted in income of \$97,000.00 and \$131,000.00, respectively.

Specification of Errors.

1. The District Court erred in holding that the sum of \$75,000.00 paid by appellants into the decedent's estate could not be capitalized and amortized over the economic useful lives (two years) of the assets of the business purchased by said payment, or, in the alternative, deducted as current expense during said two years.

2. The District Court erred in refusing and failing to find as a fact that said sum of \$75,000.00 was paid into decedent's estate because of the existence at the date of his death of certain valuable contracts and purchase orders having two-year lives; and in finding, to the contrary and without support in the record, that said contracts and

purchase orders had no substantial value and that the California partnership had net assets of \$71,000.00 other than and in addition to said contracts and purchase orders.

3. The District Court committed the foregoing errors with respect to \$10,561.30 of the \$50,000.00 paid into decedent's estate in respect of his interest in the Alaska partnership.

Summary of Argument.

Under California law, when a partner dies and the death dissolves the partnership, the decedent's interest in partnership assets vests in the surviving partner. But the latter holds the decedent's interest in such assets as a trustee and must account to the decedent's estate for their worth. When he pays the estate the value of the decedent's interest in such assets he acquires for himself the beneficial ownership of them, and what he pays becomes the cost basis of the assets. To hold that the cost is not the cost of the assets, but is the cost of an intangible interest in a partnership, as did the lower court, is to lose sight of the simple fact that death dissolved the partnership and that the decedent's interest therein, as a separate intangible asset, ceased to exist or will cease to exist the moment the purchase is made. There remain only the underlying assets representing the values purchased, to which the cost must be assigned.

The testimony regarding the value of the contracts and purchase orders was not contradicted.

ARGUMENT.

I.

The District Court Erred in Holding That the Sum of \$75,000.00 Paid by Appellants Into the Decedent's Estate Could Not Be Capitalized and Amortized Over the Economic Useful Lives (Two Years) of the Assets of the Business Purchased by Said Payment, or, in the Alternative, Deducted as Current Expense During Said Two Years.

The conclusions of law of the lower court appear on page 91 of the record. Limiting our consideration here for the moment to the California partnership, which is the principal source of controversy, those conclusions of law are in essence that:

(a) by the payment of \$75,000.00 to the estate of their father the three Anderson sons and the wives of two of them “* * * purchased the interest of H. S. Anderson, deceased, in the partnership known as H. S. Anderson Co. * * * and not specific assets or specific contracts * * *;” and

(b) the sums thus paid “* * * are not deductible as expenses under any provisions of the Internal Revenue Code, are not amortizable, cannot be capitalized and depreciated and did not give rise to deductible losses in 1943 or 1944 or loss carrybacks from 1944 to 1943.” [R. 91.]

In its “Memorandum of Decision” the court further stated that “The Courts cannot characterize the situation as one involving good will. * * * The record shows that good will was not purchased * * *, unless it was the small difference between \$75,000 and the \$71,000 * * *.” [R. 64.]

The lower court thus adopted the view urged by the Government, namely, that the sum of \$75,000.00 was paid for the decedent's interest in the former California partnership and could not be apportioned as the cost of the various assets used in the business. The result is that appellants have been denied a recovery of their \$75,000.00 cost in computing income taxes. They were prohibited deductions as expenses; they could not capitalize the payment and recover their investment through depreciation or amortization deductions; and consequently to this date they have never recovered their cost taxwise.

It is fundamental that the Internal Revenue Code levies a tax upon *net income*, as distinguished from *gross income*. And, with the possible exception of good will which is not involved here, the theory of the Code is to permit deductions from gross income for sums paid out by taxpayers. Payments are classified either as expenses or as capital expenditures. The Code permits a tax recovery of expenses by their outright deduction from gross income in the year paid or incurred. Section 23 authorizes the deduction of business expenses as well as expenses paid for the production of income in the following language:

“Sec. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) Expenses.—

(1) Trade or Business Expenses.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *.

* * * * *

(2) Non-Trade or Non-Business Expenses.—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.”

If a payment is a capital expenditure (namely, the purchase price of a capital asset or assets), as distinguished from an ordinary current expense, then the payment is capitalized instead of deducted. In that event the recovery of cost, taxwise, is permitted by means of annual depreciation or amortization deductions spread ratably over the economic life of the asset acquired by the purchase. Section 23(1) of the Code provides that in computing net income there shall be allowed as a deduction “* * * A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) —(1) of property used in the trade or business, or (2) of property held for the production of income.”

And in this connection Section 23(n) specifies that the “* * * basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114,” which requires the same basis for this purpose as is used for the purpose of determining gain upon the sale of property. With exceptions not here pertinent, Section 113 lays down the general rule that such basis is the “*cost of such property.*”

When the lower court adopted conclusions of law holding that the sum of \$75,000.00 in question here was not deductible as an expense and could not be capitalized and amortized or depreciated, it is respectfully submitted

the court committed fundamental and reversible error. It simply failed to give effect to the plain provisions of the Internal Revenue Code. The result of that error was to tax these appellants upon gross income in that they have not been permitted to deduct or recover their \$75,000.00 cost.

Appellants' position in this case is that the sum of \$75,000.00 paid by them must be apportioned among partnership assets and recovered by way of depreciation or amortization. The evidence showed, as will appear hereinafter, that the appellants desired to purchase the decedent's interest in the California partnership because of substantial income or profits expected to be derived by them from operation of the business under certain contracts and purchase orders during the two years following the date of decedent's death. Hence, appellants contend that their cost of \$75,000.00 should be recovered over said two-year period (1942 and 1943) and out of the income or profits expected to be realized—and which were in fact realized.

Appellants contend that the present case is governed directly by the reasoning of the decision of the Tax Court of the United States in *Nathan Blum*, 5 T. C. 702. The curious point is that appellants here are relying upon the argument which the Government successfully advanced in that case. In that case one of two partners in a partnership bought out the interest of the other partner and soon thereafter sold at a profit certain of the assets which previously had been owned by the partnership. The Treasury Department contended that he should pay tax upon the profit and that he was entitled to use as the cost basis of such assets a fair allocation of the sum which he had paid the retiring partner. The taxpayer

there attempted to be relieved of such tax by arguing that he had not bought assets as such, but merely had bought an interest in the partnership or in the business.

It seems inescapable that the argument thus advanced by the taxpayer in the *Blum* case is precisely the argument which the Government advances here. But the Tax Court rejected the taxpayer's position and applied the familiar doctrine in tax law that if a business (or any other group of assets) is purchased for a lump sum, the purchase price must be allocated among the various assets purchased and gain or loss must be separately computed upon the sale or other disposition of each of the various assets acquired. A corollary of this principle, of course, is that the cost thus allocated to each of the various assets becomes its cost for all purposes, including the basis for computing allowances for depreciation prior to the sale of the asset, as heretofore shown.

In disposing of the conflicting contentions, the purchaser contending that he had merely purchased an intangible partnership interest, while the Government contended that he had purchased an interest in various assets, the court said at page 709:

"The result contended for by petitioner, however, does not follow from his premise. His contention ignores the fact, which can not be denied, that as a result of the transaction between him and his brother he became sole owner of all the assets of the business and that some of those assets were disposed of during the period from November 1 to December 31, 1940. Petitioner's argument, in a slightly different guise, is in all material respects the same argument that has many times in the past been refuted; that is to say, that where property is acquired as a whole, gain or loss is not realized until it is all disposed of,

even though it be disposed of in parcels. Such contentions are inconsistent with the theory of the tax laws, which are designed to levy taxes upon gains and profits of business for annual periods. *Heiner v. Mellon*, 304 U. S. 271. It is now well settled that where property is acquired as a whole, for a lump sum, and subsequently disposed of a portion at a time, there must be an allocation of the cost or other basis over the several units (except where apportionment would be wholly impracticable) and gain or loss computed and reported upon the disposition of each part. See *Santa Maria Gas Co.*, 10 B. T. A. 1412; *O. H. Himelick*, 32 B. T. A. 792; *Bancitaly Corporation*, 34 B. T. A. 494; *T. H. Symington & Sons, Inc.*, 35 B. T. A. 711; cf. *Heiner v. Mellon*, *supra*.

“The cases relied upon by petitioner, among them *Commissioner v. Shapiro*, 125 Fed. (2d) 532; *Thornley v. Commissioner*, 147 Fed. (2d) 416, reversing 2 T. C. 220; *McClellan v. Commissioner*, 117 Fed. (2d) 988, affirming 42 B. T. A. 124; *Dudley T. Humphrey*, 32 B. T. A. 280; and *Williams v. McGowan*, 58 Fed. Supp. 692, we think, are not in point. The issue in most of these cases was the taxability of a retiring partner, and the problem was whether that partner’s gain or loss was ordinary or capital. In the *McGowan* case, the issue was whether the loss sustained by a surviving partner who purchased the interest of his deceased partner and some two weeks later sold the entire business was an ordinary loss or a capital loss. Such is not the problem here, for we are not dealing with the sale of the business by petitioner as an entirety. In none of those cases was the proposition contended for by petitioner, namely, that gain or loss is not realized until sale or disposition of the business as such, even hinted at.”

It has never been held that amounts paid for a partnership interest are not to be allocated to the partnership assets. The cases of *Commissioner v. Shapiro*, 125 F. 2d 532; *Stilgenbauer v. United States*, 115 F. 2d 283, and *Thornley v. Commissioner*, 147 F. 2d 416, do not so hold. They involved the tax situation of a seller of an interest in a partnership, and whether he realized capital gain or ordinary income. This, in turn, depended upon whether he had sold his partnership interest or his interest in the partnership assets. Those cases did not even consider the tax situation of the purchaser. And, as we have seen from the *Blum* case, if the partnership is dissolved and the purchaser becomes the owner of the assets, it is proper to allocate the payment as the cost of the assets. Indeed, there is nothing else that can be done.

We have set forth in the Appendix hereto the pertinent sections of the California Corporations Code dealing with the rights of partners and their representatives upon the death of a partner. Such provisions may be summarized as follows, insofar as relevant to the instant case:

Unless the partnership agreement contains a provision to the contrary, a partnership is dissolved by the death of a partner. Upon dissolution, the partnership is not terminated, but continues until the winding up of the partnership affairs is completed. Dissolution terminates the authority of the surviving partner to act for the partnership, except to the extent necessary to wind up its affairs.

The three property rights of a partner, as defined by California law, are: (a) his rights in specific partnership property; (b) his interest in the partnership; and (c) his right to participate in the management. With respect to the first right, a partner is a co-owner with his other partners in specific partnership property, holding as a tenant in partnership, and on his death his right in specific partnership property vests in the surviving partner; but such surviving partner has no right to possess the partnership property except for partnership purposes, *i.e.*, winding up purposes. The surviving partner becomes a trustee for the decedent's share, and owes a strict duty to account to his estate for the value of his share of the assets. In *Sibert v. Shaver*, 111 Cal. App. 2d 833, 245 P. 2d 514, 519, the court said:

“A surviving partner is a trustee of the trust inherited from his decedent, and of the assets of the partnership. As such he owes the maximum of good faith and personal confidence to the decedent and to the latter's beneficiaries. * * *

When a partner dies, and the surviving partner continues the business, the legal representative of the deceased partner is entitled to be paid the value of the decedent's interest at the date of dissolution of the partnership (*i.e.*, at the date of death), and he is entitled to receive such value with interest, or, at the option of the legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership.

In the present case these statutory provisions were complied with meticulously. The surviving partner accounted to the decedent's estate for the value of the assets, which was agreed to be \$75,000.00, and also he paid to the estate, in lieu of interest, the estate's share of the profits of the business for the approximate year following the date of the death, or \$228,369.32. Instead of making the purchase of the assets alone, the surviving partner was joined by his two brothers and the spouses of those who were married at the time, and the purchase price was paid by these five in certain designated proportions.

In these actions the appellants seek merely to recover, taxwise, the benefit of their cost of \$75,000.00. They earned large amounts of income in 1942 and 1943 as a result of their purchase, upon which they have paid very substantial income taxes. They have not been permitted to deduct the cost to which they were put in order to be able to realize that income.

We respectfully submit that the lower court erred in refusing to permit the appellants to deduct the cost by way of amortization deductions over the two years during which the profits were realized.

II.

The District Court Erred in Refusing and Failing to Find as a Fact That Said Sum of \$75,000.00 Was Paid Into Decedent's Estate Because of the Existence at the Date of His Death of Certain Valuable Contracts and Purchase Orders Having Two-year Lives; and in Finding, to the Contrary and Without Support in the Record, That Said Contracts and Purchase Orders Had No Substantial Value and That the California Partnership Had Net Assets of \$71,000.00 Other Than and in Addition to Said Contracts and Purchase Orders.

Having erroneously concluded as a matter of law that the purchase price of \$75,000.00 could not be apportioned and allocated as the cost basis of the assets of the business, the lower court proceeded to make certain findings of fact diametrically opposed to the evidence, as follows:

(a) Paragraph XVI [R. 84]:

“XVI.

Whatever contracts were in existence at the time of death of the deceased had no substantial value and had as a value only a small percentage of the value of \$100,000.00 contended for by plaintiffs. The contracts were never set up on the books of the partnerships as capital assets and never carried any value on the books”

(b) Paragraph XVII [R. 85]:

“XVII.

At the time of decedent's death, the balance sheet of the California partnership as properly adjusted indicates that the decedent had an interest in the California partnership in excess of \$71,000.00, without the alleged contracts being listed as assets.”

(c) Paragraph XXIV [R. 88]:

“XXIV.

Interests in the respective partnerships were purchased and not specific assets. The sons and their wives could have purchased the specific contracts if they desired but did not do so. Had they done so, and paid into the estate \$100,000.00 which they contend is the value of the contracts they could not have purchased thereafter, the interest of the decedent in the California partnership for \$75,000.00 and interest in the Alaska partnership for \$40,000.00 as the partnerships had other assets and had the value that the plaintiffs now contend been placed upon them, they would have had to pay closer to \$150,000.00 for the interest of the decedent in the California partnership alone.”

(d) Portions of Paragraph XXVII [R. 89-90]:

“XXVII.

The plaintiff has failed to establish that the California partnership had an asset of substantial value at the date of H. S. Anderson, Senior's death in what later consisted of a subsistence business at the Basic Magnesium plant at Roysen, Nevada. * * * The contracts have no value, were not purchased and could not be deducted as expenses paid for the production or collection of income, or the management, conservation or maintenance of property held for the production of income, or could not be capitalized and amortized or depreciated or allowed as a loss in either 1943 or 1944.”

These findings are absolutely devoid of evidence to support them and in fact are contrary to the uncontradicted record. Furthermore, they exhibit the confusion necessarily resulting from the erroneous conclusion of law that “an interest” was purchased rather than specific assets.

The uncontradicted evidence establishes the following facts:

(a) At the date of death of the decedent the liabilities of the California partnership were equal to the assets of the partnership, with the result that there was no net equity or net worth on the books for the decedent's 75 per cent interest in the partnership. [See the balance sheet at December 31, 1941, Ex. 16, R. 127.]

(b) The surviving partner, H. S. Anderson, Jr., testified that he had kept the books of the partnership from 1938 to 1941 [R. 174] and was familiar with the fact that there was no book value or net worth at the time his father died. He was asked why, then, he was willing to agree, in arms-length negotiations with his stepmother through their respective counsel, to pay \$75,000.00 to his father's estate. His testimony on this crucial point was as follows (and it was never questioned or contradicted during the entire trial):

“Q. Was that contract the result of protracted negotiations? A. Yes, some eight months of negotiations.

Q. In that contract you agreed to pay to the estate of your father \$75,000 with respect to this California partnership; was that price, value, subject to negotiation between you, on the one hand, and Mrs. Orien Anderson, on the other, through your respective counsel? A. Yes, it was. That was the sixty-four-dollar question, the price that we could agree on as to setting a value on contracts that we were purchasing.

Q. Would you tell the court why you— A. That we hoped to purchase.

Q. Would you tell the court why you were willing to pay into the estate \$75,000? A. Well, I

figured that we had a chance to make a profit by operating the contracts, and in our best judgment that was the price that we could afford to pay and get our money back and hope to make, naturally, an additional profit on top of it.

Q. Were you familiar with the books of the company at that time? A. Yes, I was. [56]

Q. And its balance sheet? A. Yes, I was.

Q. What was your educational background? A. I was a graduate from Stanford University in 1936, economics major, and I then went on to Harvard Business School, took a year of business administration courses at Harvard Business School.

* * * * *

Q. Were you aware of the fact—I call your attention there to Exhibit 16—that your father's capital account showed no net worth on the date of his death? [57] A. Yes, I was.

Q. In your negotiations, was anything ever said regarding good will? A. Never anything to my recollection was ever said about good will.

Q. Did you pay any money for good will? A. No.

Q. What was it that you paid for for that \$75,000, or obligated yourself?

Mr. McHale: I object to that question, your Honor. The contract speaks for itself and is the best evidence of what the parties purchased. That is Exhibit 2.

The Court: Objection sustained. Let me see Exhibit 16.

(Document handed to the court.)

Q. (By Mr. Bennion): Mr. Anderson, I will ask you if there was any good will in the business of the California partnership at the date of death? A. I would say no.

Q. Would you explain why? A. Well, this business that we happened to be in to me is a business of personal service, and its success depends entirely on the active operating working partners. When H. S. Anderson, Sr., died, the good will was attached to him, any good will that he had built up was certainly his, and as far as I am concerned it died with him. [58]

Q. Why, then, were you willing to pay \$75,000? A. Because I was aware from my own knowledge and experience, as a partner in this business, of the profit prospects or possibilities from the contracts that were then existent in this California partnership.

Q. Were those profits realized? A. I would say they definitely were realized.

Q. Do you remember roughly how much profit was earned during '42 and '43 by the California partnership? A. As I recall it, in 1942 the partnership profit was approximately \$246,000 as reflected in our books and tax returns.

The Court: How much?

The Witness: \$246,000, approximately.

The Court: This is the California partnership?

The Witness: The California partnership, 1942 profit. In 1943, as I recall the California partnership profit was approximately \$96,000. And based on that profit showing I think quite naturally the contracts that we bought for \$75,000 were certainly well repaid." [R. 173-6.]

And, indeed, at the conclusion of the trial, towards the close of argument, the court made the following observation [R. 261]:

"Now, whether or not plaintiffs' contention is correct that they can take the amount of money that was

paid and then allocate it is another question. Certainly it would be fair to make a finding that the Anderson Brothers would not have paid the \$125,000 (\$75,000.00 for the California partnership interest and \$50,000.00 for the Alaska partnership interest) if it had not been for the subsistence deals then existing at San Luis Obispo, Camp Roberts—and what is the other one?

Mr. H. S. Anderson: Basic Magnesium, Douglas, and Calship.”

Yet we now have the court adopting findings of fact to the effect that the contracts had no substantial value. We respectfully submit the court committed reversible error.

The Court's statements that there were other assets of \$71,000.00 and that if the contracts and purchase orders had been purchased as specific assets for \$75,000.00 the appellants would have been required to pay some \$150,000.00 into the estate, are erroneous and are based upon a misunderstanding of an exhibit introduced by the Government.

As we have shown above, the books of the partnership at date of death showed no net assets; all the assets were offset by liabilities. The Government introduced as Exhibit A a reconstructed balance sheet for the California partnership at December 31, 1941 (a photostatic copy of which appears at page 129 of the record), which was prepared by an Internal Revenue Agent. The parties stipulated that the Agent prepared the revised balance sheet *at a date subsequent to the agreement of December*

11, 1942, the date on which the value of \$75,000.00 was agreed upon. In other words, the sum of \$75,000.00 was agreed upon as the value of the potential profits in the contracts and purchase orders without any thought of what adjustments might later be made by an Internal Revenue Agent.

Now, an Internal Revenue Agent came in and made a report on December 30, 1942 [Ex. 18], covering the income of the California partnership for the years 1939, 1940 and 1941. Insofar as here material, the Agent adjusted depreciation and restored to the equipment account certain small items of equipment which had been charged to expense on the books. The net result of these adjustments was to increase the equipment account from \$24,088.30 per books to \$127,316.86 and the depreciation reserve from \$21,665.94 to \$77,536.87, an increase in the net equipment account of \$47,357.63.

By virtue of this and other minor adjustments, the Agent would make it appear that the decedent's capital account on the date of death was \$71,601.81 instead of \$29,013.26. [Ex. A.]

This is completely fallacious.

In the first place, it happened nearly a month after the figures were agreed upon in the basic contract of December 11, 1942 [Ex. 2] and hence obviously did not influence the agreed and negotiated fair market values. If the balance sheet had shown any amount other than \$29,013.26 on the date of death, the figure would have been paid to his estate as repayment of advances made, as indeed the

\$29,013.26 was paid. It would have nothing to do with the \$75,000.00 paid for the estate's interest in the contracts.

In the second place, by increasing the equipment account by \$47,357.63, the Agent did not give the five plaintiffs access to a deduction they otherwise did not enjoy. In the basic agreement of December 11, 1942 [Ex. 2, R. 124-5] the Anderson brothers agreed to pay any income tax deficiencies assessed for years prior to 1942. Hence, when the Agent restored to equipment account items deducted on the 1939, 1940 and 1941 returns, he proposed deficiencies in income tax for those years which the Andersons had to discharge. By paying such deficiencies, they were entitled to depreciation deductions in the subsequent two years. In other words, this was merely trading deductions as between one year and another. It had nothing to do with the \$75,000.00 paid for the contracts; and in deducting or amortizing the latter sum the parties are not obtaining the benefit of any double deductions of the same items.

In the third place, the alleged capital of decedent of \$71,601.81 includes the sum of \$29,013.26 appearing on the partnership books as a liability due him and which was paid to his estate in addition to the value of \$75,000.00. [See R. 121, 127, 129.]

In the fourth place, only 75 per cent of the increase in equipment account was attributable to the decedent's interest, or \$35,518.22, and one-half of that sum was exhausted by depreciation during the year 1942 while the

estate was still entitled to net income and prior to the acquisition by the appellants. And of the remaining half, or \$17,759.11, more than this sum was paid by the plaintiffs as deficiencies in income tax for prior years. Hence, even if the Government's position here were sound in principle (which it is not), in actual experience there would be no dilution of the deductions to which appellants are entitled.

III.

The District Court Committed the Foregoing Errors With Respect to \$10,561.30 of the \$50,000.00 Paid Into Decedent's Estate in Respect of His Interest in the Alaska Partnership.

What has been said heretofore with respect to the California partnership applies with equal force to the Alaska partnership and for the same reasons. The only difference is this: when decedent died he had a net equity in the assets of the Alaska partnership on its books in the amount of \$39,438.70. This amount was not paid to his estate in addition to the \$50,000.00, as was the \$29,013.36 item in connection with the California partnership. The result is that to the extent there was this net book equity, appellants will recover their investment tax-wise through depreciation or amortization of those book assets, or by deducting their costs upon sales. Hence, they are entitled to deduct or recover their \$50,000.00 investment in the Alaska partnership only to the extent that such recovery will not be obtained through depreciation of the book assets, and that amount is the difference between the book equity of \$39,438.70 and the \$50,000.00 paid, or \$10,561.30. This latter amount has never been recovered for tax purposes by the appellants.

Conclusion.

In view of the foregoing it is respectfully submitted that the judgments of the lower court should be reversed and the appellants should be held to be entitled to deductions of \$75,000.00 and \$10,561.30, one-half in each of the years 1942 and 1943.

Dated at Los Angeles, California, this 29th day of November, 1955.

MACKAY, MCGREGOR, REYNOLDS & BENNION,

By A. CALDER MACKAY,

By ADAM Y. BENNION,

By STAFFORD R. GRADY,

Counsel for Appellants.

APPENDIX.

CALIFORNIA CORPORATIONS CODE

1. "§15031. Causes of dissolution. Dissolution is caused: * * *
(4) By the death of any partner;
* * *"
2. "§15030. Partnership not terminated by dissolution. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."
3. "§15033. General effect of dissolution on authority of partner. Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership, * * *".
4. "§15024. Extent of property rights of a partner. The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management."
5. "§15025. Nature of a partner's right in specific partnership property. (1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

* * *

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to

possess the partnership property for any but a partnership purpose.”

6. “§15026. Nature of partner’s interest in the partnership. A partner’s interest in the partnership is his share of the profits and surplus, and the same is personal property.”
7. “§15042. Rights of retiring partner or estate of deceased partner when the business is continued. When any partner retires or dies, and the business is continued under any of the conditions set forth in Section 15041 (1, 2, 3, 5, 6), or Section 15038 (2b) without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided, that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by Section 15041 (8) of this act.”
8. “§15043. Accrual of actions. The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to to the contrary.”

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. S. ANDERSON, JR.,

*vs.**Appellant,*

UNITED STATES OF AMERICA,

Appellee.

ETHEL H. ANDERSON,

*Appellant,**vs.*

UNITED STATES OF AMERICA,

Appellee.

ROBERT W. ANDERSON,

*Appellant,**vs.*

UNITED STATES OF AMERICA,

Appellee.

GLORIA S. ANDERSON,

*Appellant,**vs.*

UNITED STATES OF AMERICA,

Appellee.

JOHN HARDY ANDERSON,

*Appellant,**vs.*

UNITED STATES OF AMERICA,

Appellee.

On Appeals From the Judgments of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

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Assistant Attorney General;

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WALTER AKERMAN, JR.,

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United States Attorney;

EDWARD R. McHALE,

*Assistant United States Attorney,**600 Federal Building,
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No. 14796.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. S. ANDERSON, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ETHEL H. ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ROBERT W. ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

GLORIA S. ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JOHN HARDY ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeals From the Judgments of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

Opinion Below.

The District Court's memorandum of decision [R. 59-68] and its findings of fact and conclusions of law [R. 71-92] are reported at 131 F. Supp. 501.

Jurisdiction.

These appeals involve additional federal income taxes and interest paid for the year 1943,¹ which were paid to the Collector of Internal Revenue for the Sixth Collection District of California, at Los Angeles, California, in February and March of 1947. Appropriate claims for refund thereof were timely filed with the Collector of Internal Revenue at Los Angeles on December 28, 1948, which were disallowed by the Commissioner of Internal Revenue by registered notices dated August 29, 1949. [R. 8-9, 15-22, 29-30, 56, 72-73.] Complaints for the recovery of such additional taxes and interest, based on the refund claims disallowed by the Commissioner, were filed in the court below within the time provided in Section 3772 of the Internal Revenue Code of 1939 on August 4, 1950. [R. 3-28, 271.] The suits were brought against the United States, and the court below had jurisdiction of the actions under 28 U. S. C., Section 1346(a)(1).

On March 22, 1955, the District Court entered judgments dismissing the complaints. [R. 92-100.] Notices of appeals were filed on May 20, 1955. [R. 100-105.] The jurisdiction of this Court is invoked under 28 U. S. C., Section 1291.

¹Protective claims also were filed by each taxpayer for refund of the full amount of income taxes paid for 1944 on the ground that if the deductions from income for 1942 and 1943 here involved were not allowable, then a net operating loss was sustained in 1944 which could be carried back to 1942 and 1943, and such alternative relief was claimed in the complaints. [R. 14, 22-27, 73-74.] No such issue is presented on these appeals, however. Also, while the payments which gave rise to this controversy were made in 1942 and 1943, and were claimed as deductions for the years in which they were made, only the year 1943 is involved because of the tax forgiveness provisions of Section 6 of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126.

Question Presented.

Whether the court below erred, under the facts and the law, in holding that the taxpayers were not entitled to deduct from their gross income for 1942 and 1943, for federal income tax purposes, either as an amortization allowance deductible under Section 23(1) of the Internal Revenue Code of 1939 or as ordinary and necessary business expenses deductible under Section 23(a) thereof, amounts paid by them respectively in acquiring the interest of the estate of H. S. Anderson, Sr., deceased, in two businesses conducted by H. S. Anderson, Sr., and one or more of the taxpayers, in partnership, prior to his death on December 27, 1941.

Statutes Involved.

The pertinent statutory provisions are set forth in the Appendix, *infra*.

Statement.

These appeals were taken by five individuals from judgments of the court below [R. 92-100], all of which are based on the same facts and involve the same issues of law. The court below made extensive findings of fact [R. 72-90], and by agreement of the parties [R. 271] the record on appeal in the case of *H. S. Anderson, Jr. v. United States* may be considered as the record in the other cases for purposes of this appeal. The material facts found by the court below [R. 71-92], while they relate primarily to the appeal of H. S. Anderson, Jr., may be summarized for present purposes as follows:

Three of the appellants, H. S. Anderson, Jr., Robert W. Anderson, and John Hardy Anderson, are sons of Harold S. Anderson, Sr., deceased; Ethel H. Anderson is

the wife of H. S. Anderson, Jr., and Gloria S. Anderson is the wife of Robert W. Anderson. [R. 154.]

Harold S. Anderson, Sr., died intestate on December 27, 1941. Prior to the date of his death, he was a member of a partnership (sometimes referred to herein as the California partnership), consisting of himself and his son, H. S. Anderson, Jr., in which H. S. Anderson, Sr., the decedent, owned a 75% interest and H. S. Anderson, Jr., owned a 25% interest. The business of this partnership consisted of subsistence contracting work (feeding and housing defense workers) and was conducted in the States of California and Nevada under the name of "H. S. Anderson." The California partnership was organized on January 1, 1938, by virtue of an oral agreement between the decedent and H. S. Anderson, Jr., which contained no agreement for continuance of the partnership in the event of the death of one of the partners. [R. 74-75.]

Also, prior to the date of his death, Harold S. Anderson, Sr., the decedent, was a member of another partnership (sometimes referred to herein as the Alaska partnership) consisting of himself and his three sons. Harold S. Anderson, Sr., owned a 40% interest in this partnership, while Robert W. Anderson owned a 30% interest, John Hardy Anderson owned a 20% interest, and H. S. Anderson, Jr., owned a 10% interest. This partnership was engaged in similar activities within the Territory of Alaska under the name of "Anderson Brothers Supply Company of Alaska." The Alaska partnership was created August 31, 1940, by the execution of a written partnership agreement. [R. 75; Ex. 1.]²

²Exhibits introduced at the trial have been transmitted to this Court in original form, and, by agreement of the parties [R. 264, 269-271], most of them, including Exhibit 1, have been omitted from the printed record.

On December 11, 1942, a written agreement [R. 113-126] was entered into between Orien H. Anderson, the widow of Harold S. Anderson, Sr., H. S. Anderson, Jr., as administrator of the estate of H. S. Anderson, Sr., deceased, and H. S. Anderson, Jr., individually, Robert W. Anderson, and John Hardy Anderson, sons by a former marriage, and Orien H. Anderson, as guardian of the person and estate of William Todd Anderson, a minor, whereby the parties made certain declarations and admissions for the purpose of settling certain controversies and differences among them relative to the extent and character of the estate of Harold S. Anderson, Sr., deceased. [R. 75-76.]

The agreement of December 11, 1942, after reciting the death of Harold S. Anderson on December 27, 1941 [R. 113], and the relationship of the decedent and the parties to the agreement [R. 113-114], and stating that it was the purpose and intention of the parties to the agreement to settle certain controversies and differences which had heretofore existed between them relative to the extent and character of the estate of Harold S. Anderson, Sr., deceased, to provide money for the payment of the obligations of the estate, and to expedite distribution of the estate to the decedent's heirs, and declaring the formation and interests in the California and Alaska partnerships to be as stated above [R. 114-117], provided in material part that [R. 77-79, 117-118, 119, 123, 125]:

6. H. S. Anderson, Jr., as surviving partner of the California Partnership, in full satisfaction and discharge of all claims of the estate of H. S. Anderson, deceased, and of the heirs of H. S. Anderson, deceased, for and on account of the interest of said H. S. Anderson in his lifetime and that his estate

has acquired since his death in and to the California Partnership, hereby agrees to pay into the estate of H. S. Anderson, deceased, the following sums of money:

(a) The sum of \$75,000.00 representing, as the parties hereto agree, the fair market value at date of the death of the decedent, of his interest in said California partnership;

(b) The sum of \$228,369.32, representing, as the parties hereto agree, the estate's share of the profits of The California Partnership from date of the death of the decedent, December 27, 1941, to the date of this agreement.

* * * * *

8. H. S. Anderson, Jr., Robert W. Anderson, and John Hardy Anderson, as surviving partners of The Alaska Partnership, in full satisfaction and discharge of all claims of the estate of H. S. Anderson, deceased, and of the heirs of H. S. Anderson, deceased, for and on account of the interest of H. S. Anderson in his lifetime and that his estate has acquired since his death in and to The Alaska Partnership, hereby agree to pay into the estate of H. S. Anderson, deceased, the following sums of money:

(a) The sum of \$50,000.00, representing, as the parties hereto agree, the fair market value at date of death of the decedent of his interest in said Alaska Partnership;

(b) The sum of \$38,000.00, representing, as the parties hereto agree, the estate's share of the profits of The Alaska Partnership from the date of the death of the decedent, December 27, 1941, to the date of this agreement.

* * * * *

17. All the parties hereto agree that the real property and the improvements thereon, said real property being described as follows:

Lots 65 and 66, in the Industrial Center Tract, in the County of Los Angeles, State of California, as per map recorded in Book 12, page 101, of Maps, in the office of the County Recorder of said County,

and also the shares of stock of Douglas Oil & Refining Corporation, although in the record name of H. S. Anderson, are in reality the property of The California Partnership, and all parties hereto will join in such proceedings as may be proper, convenient or necessary to effectuate quieting title to that effect.

* * * * *

22. In addition to the property set forth in paragraph 17, hereof, there is also a certain oil lease in Ventura County and certain Puett Starting Gate Company stock which is in the name of H. S. Anderson, deceased, but which is the property of the California co-partnership and which is to be handled as provided for in said paragraph 17.

The above agreement of December 11, 1942, was approved by the Superior Court of the State of California in and for the County of Los Angeles, sitting as a court of probate, on December 22, 1942, by order of court which further found, in material part, as follows [R. 79-81; Ex. 21]:

That H. S. Anderson, deceased, owned a 75% interest in a California partnership known as H. S. Anderson, also known as H. S. Anderson Co., which interest was separate property.

That H. S. Anderson, Deceased, owned a 40% interest in a partnership known as Anderson Bros.

Supply Co. of Alaska, which interest was community property. * * *

That the value of the estate's interest in the California partnership as of the date of death was \$75,000.

That the value of the estate's interest in the Alaska partnership as of the date of death was \$50,000.00. * * *

That H. S. Anderson, Jr., as the surviving partner of the California partnership, in full satisfaction and discharge of all claims of the Estate of H. S. Anderson, deceased, and of the heirs of H. S. Anderson, deceased, for and on account of the interest of said H. S. Anderson in his lifetime and that his estate has acquired since his death in and to the California partnership, shall pay into the Estate of H. S. Anderson, deceased, the following sums of money:

(a) The sum of \$75,000, representing the fair market value at date of the death of the decedent of his interest in said California partnership. * * *

That said H. S. Anderson, Jr., Robert W. Anderson, and John Hardy Anderson, as surviving partners of the Alaska partnership, in full satisfaction and discharge of all claims of the Estate of H. S. Anderson, deceased, and of the heirs of H. S. Anderson, deceased, for and on account of the interest of H. S. Anderson in his lifetime and that his estate has acquired since his death in and to the Alaska partnership, shall pay into the estate of H. S. Anderson, deceased, the following sums of money:

(a) The sum of \$50,000.00, representing the fair market value at date of death of the decedent of his interest in said Alaska partnership. * * *

On December 27, 1941, the only activities of the Alaska partnership consisted of subsistence contract work in connection with the construction of the air base Anchorage, Alaska, pursuant to a contract dated July 24, 1940, the contract and operations thereunder being terminable at the will of the Secretary of War. On the same date the California partnership was engaged under contracts or purchase orders, including (a) operation of the post exchange fountain-grills at Camp San Luis Obispo, California, pursuant to an oral agreement entered into in or about March, 1941, later reduced to writing under date of December 9, 1941, terminable on 30 days' notice by either party; (b) operation of the post exchange fountain-grills at Camp Roberts, California, pursuant to a contract dated June 5, 1941, terminable on 60 days' notice by either party, which contract was canceled by the Camp Roberts Post Exchange on February 1, 1943, due to change in military personnel and policy at the Camp; (c) operation of the in-plant feeding facilities at the California Shipbuilding Yards, Terminal Island, California, pursuant to a contract dated September 2, 1941, terminable on 48 hours' notice by the Shipbuilding Corporation, which was canceled by the Corporation on July 27, 1942; (d) operation of the in-plant feeding facilities at the Douglas Aircraft Plant in Long Beach, California, pursuant to an oral agreement entered into on or about July 1, 1941, which agreement was canceled by Douglas Aircraft Company on November 19, 1942. Also, prior to the death of H. S. Anderson, Sr., the California partnership, and the surviving partner thereafter, received various purchase orders (with certain change orders) from the Defense Plant Corporation, acting by and through Basic Magnesium, Inc., for the carrying on of subsistence work during the construction of the Basic Mag-

nesium Plant near Las Vegas, Nevada. These purchase and change orders were dated on dates ranging from December 8, 1941 to October 23, 1942, and were superseded by settlement and release dated July 1, 1943, and by a new contract of the same date, terminable by either party on 90 days' notice. [R. 81-83; Exs. 9, 10, 11, 12, 13, 14, 15.]

The court below found as a fact that a reasonable estimate of the useful economic life of the above contracts and purchase orders, as determined by an Internal Revenue Agent for the purpose of computing depreciation of physical equipment, was two years from and after December 31, 1941. [R. 83.]

On December 23, 1942, a limited partnership for operation of the Anderson Brothers Supply Company of Alaska was entered into between H. S. Anderson, Jr., Robert W. Anderson, John Hardy Anderson, Ethel Hamilton Anderson, the wife of H. S. Anderson, Jr., and Gloria S. Anderson, the wife of Robert Anderson. The new limited partnership was terminated and dissolved on December 31, 1943, by mutual consent and agreement. [R. 85; Exs. 4, 6, 8.]

The court below further found with respect to this new limited Alaska partnership that there is no evidence in the record of what was distributed on the dissolution of the partnership; that there is no evidence in the record of any sale of the partnership; and that there is no evidence in the record of the value of the partnership as of the date of dissolution and termination of the whole of the partnership or of any particular partner's percentage of interest in either partnership. [R. 85-86.]

Also, on December 23, 1942, H. S. Anderson, Jr., Robert W. Anderson, John Hardy Anderson, Ethel Ham-

ilton Anderson, wife of H. S. Anderson, Jr., and Gloria S. Anderson, wife of Robert W. Anderson, formed a limited partnership known as the H. S. Anderson Company to carry on the business theretofore known as the H. S. Anderson Company and the Anderson Brothers Supply Company of Nevada. This new limited partnership also was terminated and dissolved as of the close of business on December 31, 1943, by mutual consent and agreement. [R. 86; Exs. 3, 5, 7.]

With respect to this latter limited partnership the court below also found that there is no evidence in the record of what was distributed on the dissolution of the partnership; that there is no evidence in the record of any sale of the partnership; that there is no evidence in the record of the value of the partnership as of the date of the dissolution and termination of the whole of the partnership or of any particular partner's percentage of interest in either partnership. [R. 86.]

In the formation of the above new limited partnerships by the agreements of December 23, 1942, the percentages or interests held by the sons in the respective businesses were retained by the sons and the interests of the deceased father were divided among the sons and daughters-in-law who furnished the consideration to buy the interests of the deceased. Thus, of the 75% interest owned by H. S. Anderson, Sr., in the California partnership at the time of his death, one-third was acquired by H. S. Anderson, Jr., and his wife, one-third by Robert W. Anderson and his wife, and one-third by John Hardy Anderson; and the 40% interest owned by H. S. Anderson, Sr., in the Alaska partnership was acquired by the

sons and daughters-in-law in the same proportions.³ The identities of the above 75% and 40% in the old partnerships were carried over into the new, and carried the same percentages in the new partnerships; and the court below specifically found that “The purchase price was a capital investment *and became the base for each interest in the new partnerships.*” (Italics supplied.) [R. 87-88.]

The partnership returns of the new limited partnership, “H. S. Anderson Co.”, for the years 1942 and 1943 showed as deductions the sums of \$58,082.52 and \$77,-483.28, respectively, each of which figures included the sum of \$37,500 representing one-half of the \$75,000 required to be paid under the above agreement of December 11, 1942; and the partnership returns of the new limited partnership, “Anderson Brothers Supply Company of Alaska”, for the years 1942 and 1943 showed as deductions the sums of \$25,000 and \$25,000, respectively, paid under the above agreement. [R. 55-56, 83-84; Exs. D and E.] The Commissioner of Internal Revenue determined that those payments were not deductible by the partnerships or by the individual partners thereof, and as a result the appellants paid additional income taxes for 1943 and brought these suits to recover. [R. 18-19, 56.]

The refund claims on which these suits were founded [R. 15-21, 22-27], as well as the prayer of the complaints [R. 12-14], claim deduction of the amounts involved on several alternative grounds, including deductibility as expenses under Section 23(a)(1) or (2) of the Internal Revenue Code of 1939, or that they represented payments

³See the court's tabulations of these figures. [R. 87-88.]

for the above contracts and purchase orders, the cost of which should be amortized under Section 23(1) of the 1939 Code over the useful life of the contracts; or that a loss was similarly suffered in 1944 which would, as a net operating loss, be carried back to prior years and then deducted. [R. 72-73.]

But the court below found as a fact that the taxpayers had failed to show that H. S. Anderson, Jr., had purchased particular assets of the California partnership, "H. S. Anderson Co.", from the estate of H. S. Anderson, Sr., and had failed to show that they had purchased particular assets of the Alaska partnership from the decedent's estate; that whatever contracts were in existence had no substantial value and had as a value only a small percentage of the value of \$100,000 contended for by the taxpayers; that the contracts were never set up on the books of the partnership as capital assets and never carried any value on the books; and that at the time of the decedent's death, the balance sheet of the California partnership as properly adjusted indicates that the decedent had an interest in that partnership in excess of \$71,000, without the alleged contracts being listed as assets. [R. 84-85.]

The court below also found from the evidence that interests in the respective partnerships were purchased, and not specific assets. The sons and their wives could have purchased the specific contracts if they desired, but did not do so. Had they done so, and paid into the estate \$100,000, which they contend is the value of the contracts, they could not have purchased thereafter the interest of the decedent in the California partnership for \$75,000 and interest in the Alaska partnership for \$40,000, as the partnerships had other assets and had the value that

the taxpayers now contend been placed upon them, they would have had to pay closer to \$150,000 for the interest of the decedent in the California partnership alone. [R. 88.]

The court further found from the evidence that the three brothers could have purchased the contracts in issue for cash and thus capitalized the contracts in the partnership, but that was not done. Had such a course been taken, the three sons involved here, who each took $\frac{1}{6}$ of the separate property of the father, would have recovered from the estate approximately $\frac{1}{2}$ (three times $\frac{1}{6}$) of the additional amount paid for the partnership interest. The widow and the fourth son (the minor) would have recovered from the estate one-half the additional amount received for the partnership interest in such method of handling. The three brothers have been represented and were represented in their dealings with the estate by able counsel and the actions of the taxpayers and the brothers and sisters-in-law were taken advisedly and the alternatives above rejected. [R. 89.]

The court further found, also on the evidence, that before and up to the date of his death, the decedent and his partner-sons never treated the contracts as capital items. The acts of the deceased on the taxpayers as partners in the old partnerships have a bearing on their intent and the realities of the situation. [R. 89.]

Finally, the court found, also on the evidence, that the taxpayers had failed to establish that the California partnership had an asset of substantial value at the date of the death of H. S. Anderson, Sr., in what later consisted of a subsistence business at the Basic Magnesium plant at Roysen, Nevada. On the contrary, it pointed out that the evidence indicates very little beyond preliminary nego-

tiations for the carrying on of a subsistence business had been consummated at the time of his death, that all the parties to the matter reconsidered it after the death, and only after being assured by H. S. Anderson, Jr., and his father-in-law, that H. S. Anderson, Jr., and his brothers were willing, and able, in their own right to carry it on, were further purchase orders given to H. S. Anderson. The method of arranging for the subsistence business to be carried on was by purchase orders executed by the contractor alone and not until July 1, 1943, was a binding bilateral contract between H. S. Anderson Company and the contractor entered into, which was a year and a half after the death of H. S. Anderson, Sr., and long after the purchase of the interest of H. S. Anderson, Sr., deceased, from his estate and the formation of a new limited partnership between the sons and sisters-in-law of the sons and wives of the Anderson sons. It found that the contracts have no value, were not purchased and could not be deducted as expenses paid for the production or collection of income, or the management, conservation or maintenance of property held for the production of income, or could not be capitalized and amortized or depreciated or allowed as a loss in either 1943 or 1944. [R. 89-90.]

In accordance with the foregoing findings, the District Court concluded that the taxpayers herein purchased the interests of H. S. Anderson, Sr., deceased, in the two partnerships known as H. S. Anderson Company and Anderson Supply Company of Alaska, and not specific assets or specific contracts, by the payment to the estate of the father of the sums of \$75,000 and \$40,000 respectively. The court held that the taxpayers failed to sustain their burden of proving their right to a refund of the

taxes sought by them, and that the sums can not be capitalized and depreciated, and that they did not give rise to deductible losses in 1943 or 1944, or loss carry-backs from 1944 to 1943. [R. 91.]

Summary of Argument.

The District Court rightly denied the taxpayers any expenses or amortization deductions under Section 23(a) or (1) of the Internal Revenue Code of 1939 with respect to costs allegedly incurred in purchasing from the estate of H. S. Anderson, Sr., interests in various contracts held by two partnerships in which the decedent was a partner. The taxpayers failed to comply with the settled rule that one seeking a deduction must bring himself squarely within the provisions of a statute.

Apparently their claim to an expense deduction is not seriously pressed since the taxpayers merely point to the statute with no effort to show from the record that they incurred ordinary and necessary expenses deductible thereunder.

The lower court found, in accordance with the evidence, that interests in the two partnerships were purchased from the deceased partner's estate, and not contracts. The unambiguous terms of an arm's-length agreement between the decedent's heirs and one or more of his three sons, who are taxpayers herein, as surviving partner or partners, show clearly that the sums paid the estate represented the fair market value at the date of death of the decedent's interests in the two partnerships and that such sums were paid his estate by the surviving partner or partners to purchase such interests. The California court, sitting in probate, entered an order specifically approving the fair market values placed on the estate's interests in the two partnerships and the agreement for the sale of those

interests to the surviving partner or partners. The record contains no support for the taxpayers' claim that specific partnership assets, consisting of contracts, were purchased from the estate, except for certain self-serving testimony by one of the taxpayers which is flatly contradicted by all of the records of the transaction.

Under California law, the two partnerships of which decedent was a partner were dissolved by his death, but were not terminated, the partnerships continuing until the completion of the winding up of partnership affairs. Disolution consists merely of a change in the relationship of the partners, so there was no distribution of partnership assets. A deceased partner's right in specific partnership property vests in the surviving partner or partners, who have the right to continue to possess it for partnership purposes. Therefore, the surviving partners who purchased the interests of the decedent's estate in the two partnerships would have been attempting to acquire something already vested in them if, instead, they had purchased specific partnership assets as they contend. Moreover, the estate could not have sold specific partnership assets to which it had no right.

No termination of the subsistence contracting business carried on by either of the two partnerships was contemplated for, prior to the purchase of the estate's interests in them, there was an understanding between the five taxpayers as to sharing the costs of such interests and the formation of the two limited partnerships subsequently formed by them for the continuance of such businesses. The identity of the interests purchased from the estate is readily traceable into the new limited partnerships.

A partner is a co-owner with his partner or partners of specific partnership property. However, his interest in the partnership, which is personal property, is his share of profits and surplus. His property rights consist of (1) his rights in specific property, (2) his interest in the partnership, and (3) his right to participate in management. The record discloses that all of the estate's interests in the two partnerships were purchased and it contains nothing which even suggests that the transaction was limited to specific assets of the partnerships, to which, as we have noted, the estate had no right.

As a further indication that interests in the partnerships were purchased, the record discloses that the contracts held by the two partnerships, which comprise the specific assets allegedly purchased, in fact, had very little value, as the trial court found, and were not of the value of \$100,000 as the taxpayers contended. They did not represent binding commitments of sufficiently substantial duration to even begin to support any such valuation. Moreover, the evidence indicates that the partnership interests purchased from the estate reflected substantial tangible partnership assets. No proof was offered of their value or as to the value of the contracts. Therefore, in no event would the taxpayers be entitled to the amortization deductions they seek, as they have not sustained the burden, which is upon them, of proving the amount, if any, which they are entitled to amortize.

The taxpayers' hope of profitably continuing the subsistence contracting businesses of the two partnerships in which the decedent was a partner necessarily arose from the fact that they were acquiring interests in going concerns already engaged in furnishing subsistence services to customers, since the partnerships owned no binding

contracts of very substantial duration. The amounts paid for the estate's interests in the partnerships, to the extent that they exceed the fair market value of tangible partnership assets attributable to those interests, if anything, represented going concern value.

This Court has held that a partnership interest is a capital asset. The cost of acquiring such interest is not recoverable through deductions from gross income but must await the determination of gain or loss upon ultimate disposition of the interest. The District Court was correctly advised as to the controlling principles and properly regarded as distinguishable the Tax Court case relied upon by the taxpayers.

The taxpayers might have purchased specific contracts held by the two partnerships had they so desired. Instead, they purchased partnership interests, and, of course, what was actually done controls.

The District Court fully answered the taxpayers' contention, that they will not be able to recover their costs of acquiring interests in the two partnerships unless they are permitted expense or amortization deductions, when it pointed out that they chose not to consider that they had purchased an interest in each partnership which was a capital asset and introduced no evidence to show the consequences of the termination in December, 1943, of their partnerships.

ARGUMENT.

The District Court Correctly Denied the Taxpayers an Expense Deduction Under Section 23(a) or an Amortization Deduction Under Section 23(1) of the Internal Revenue Code of 1939 for the Years 1942 and 1943 With Respect to Amounts Which the Evidence Showed Were Used to Purchase, From the Decedent's Estate, Interests in Two Partnerships Conducted by the Decedent and One or More of the Taxpayers Prior to the Decedent's Death on December 27, 1941.

These appeals involve the question whether the taxpayers are entitled to deduct from gross income for the years 1942 and 1943 certain amounts expended by them in those years in acquiring the interest of the estate of H. S. Anderson, Sr., in two partnerships of which the decedent was a member at the time of his death. In their claims for refund [R. 15-21, 22-27], as well as in the prayer of their complaints [R. 12-14], the taxpayers claimed the right to deduct such amounts upon several alternative grounds, all of which were rejected by the court below. [R. 59-68.] On these appeals, however, the taxpayers are contending (Br. 10-28) only that such payments are deductible as an amortization allowance under Section 23(1) of the Internal Revenue Code of 1939 (Appx., *infra*), which provides that in computing net income there shall be allowed as a deduction "A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)— (1) of property used in the trade or business, or (2) of property held for the production of income"; or, in the alternative, that such payments are deductible as current expenses during such years under Section 23(a) of the 1939 Code (Appx., *infra*), which provides for the allow-

ance of a deduction for "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business", and, in the case of an individual, "all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

Since the taxpayers are seeking a deduction, it is important to keep in mind the settled rule that they can entitle themselves thereto only by bringing themselves squarely within the terms of a statute. (*Deputy v. duPont*, 308 U. S. 488, 493; *White v. United States*, 305 U. S. 281, 292; *Jones v. Commissioner*, 103 F. 2d 681 (C. A. 9th).) In oft-quoted language the Supreme Court reiterated this principle in the *White* case (p. 292):

Moreover, every deduction from gross income is allowed as a matter of legislative grace, and "only as there is clear provision therefor can any particular deduction be allowed . . . a taxpayer seeking a deduction must be able to point to an applicable statute and show that he comes within its terms."

The taxpayers have wholly failed to comply with this precept.

Prior to considering the factual aspects of the case, it is to be noted that the taxpayers' alternative argument (Br. 11-13) that the amounts in issue constitute deductible expenses is not seriously pressed on brief. It is axiomatic that, before they can be allowed an expense deduction under either subdivisions (1) or (2) of Section 23(a), the taxpayers have the burden of showing that they have *incurred expenses* which are both *ordinary* and *necessary*. *Welch v. Helvering*, 290 U. S. 111;

Deputy v. duPont, *supra*, pp. 495-496; *Fontana Power Co. v. Commissioner*, 127 F. 2d 193 (C. A. 9th); *City Ice Delivery Co. v. United States*, 176 F. 2d 347, 351 (C. A. 4th), and cases there cited. The taxpayers here have contented themselves with merely citing the provisions of the statute authorizing expense deductions without any effort to demonstrate from the evidence or by reference to the decided authorities that the expenditures in question constituted ordinary and necessary expenses. Their alternative argument is, of course, inconsistent with their principal position (Br. 13-18, 27) that the expenditures in question were for capital items the cost of which is recoverable by way of depreciation or amortization, and they offer nothing, theoretical or otherwise, which would suggest any basis upon which such expenditures could properly be deducted as expenses under the statute.

The fundamental controversy concerning the facts presented to the court below is whether, by the expenditures in question, the taxpayers purchased partnership assets consisting of certain contracts the cost of which was properly recoverable by amortization, as they contended; or whether they purchased a partnership interest, which is a capital asset not subject to depreciation, as the Government claimed. The District Court resolved this issue against the taxpayers, and its disposition of the matter should not be disturbed unless shown to be clearly erroneous. (Rule 52(a), Federal Rules of Civil Procedure; *United States v. Gypsum Co.*, 333 U. S. 364, reh. den., 333 U. S. 869.) It may readily be seen from the instant record, we submit, that the District Court's finding on this issue is firmly grounded in the evidence, and is not clearly erroneous.

The District Court found and concluded [R. 84, 91] that the taxpayers failed to sustain their burden of proving by a preponderance of the evidence that they purchased particular assets from the two partnerships, interests in which were held by the estate of H. S. Anderson. On the contrary, the record is replete with evidence that, as the trial court found [R. 88], "Interests in the respective partnerships were purchased and not specific assets." Thus, an agreement (quoted from at length in the findings below [R. 75-79]), which, after lengthy negotiations, was entered into on December 11, 1942, between the widow of H. S. Anderson, both for herself and as guardian of her minor child, and the three sons of the decedent by a former marriage who are taxpayers herein, indicates unequivocally and precisely just what the taxpayers intended and undertook to purchase by the expenditures the tax consequences of which are the subject of this litigation. Under that agreement the [R. 78] "sum of \$75,000.00, representing, as the parties hereto agree, the fair market value at the date of death of the decedent, of his interest in said California partnership" was agreed to be paid [R. 77] "into the estate of H. S. Anderson, deceased" in "full satisfaction and discharge of all claims of the estate * * * and of the heirs * * * *for* and on account of *the interest* of said H. S. Anderson in his lifetime and that his estate has acquired since his death *in* and to *the California Partnership*". (Italics supplied.) Similarly, the parties agreed [R. 78] that the sum of "\$50,000.00" was "the fair market value at date of death of the decedent of his interest in said Alaska Partnership" and that payment of this amount be made to the estate "*for* and on account of *the interest* of H. S. Anderson in his lifetime and that his estate has acquired since his death *in* and to *The Alaska Partnership*". (Italics supplied.)

The agreement of December 11, 1942, covering the sale by the estate of H. S. Anderson, Sr., of the interests in the two partnerships, was approved by the Superior Court of the State of California in and for the County of Los Angeles, sitting as a court of probate, on December 22, 1942 [R. 79-81], the court's order specifically providing [R. 80] "That the value of the estate's interest" in the California and Alaska partnerships was "\$75,000.00" and "\$50,000.00", respectively, just as the parties had agreed.

The record contains nothing whatever which supports the taxpayers' contention that they purchased partnership assets, consisting of specific contracts, rather than partnership interests, save, perhaps, certain self-serving testimony of the taxpayer, H. S. Anderson, Jr., upon which they attempt to rely. (Br. 21-23.) The complete answer to that testimony is that it is flatly contradicted by all of the evidence consisting of the records of the transaction, and, indeed, upon objection, the District Court quite properly declined to permit that witness to testify that the \$75,000 paid for the estate's interest in the California partnership was paid to purchase particular contracts, and not a partnership interest upon the ground that the contract speaks for itself and is the best evidence of what the parties purchased. [R. 175.]

The pertinent provisions of the California Civil Code relating to partnerships clearly indicate the various rights and interests existing with respect to the instant partnerships. While the death of H. S. Anderson, Sr., caused a dissolution of the two partnerships in which he was a member (Deering's Cal. Civ. Code, Sec. 2425, Appx., *infra*), that dissolution was not the equivalent of a termination of the partnership business with its at-

tendant distribution of partnership assets. A dissolution consists merely of a change in the relationship of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business (Sec. 2423, Appx., *infra*), and does not terminate the partnership, which continues until the winding up of partnership affairs is completed (Sec. 2424, Appx., *infra*).

Here, it is clear that the two partnership interests held by the estate of H. S. Anderson, Sr., were, in each instance, purchased by the surviving partners. [R. 77-78, 80-81.] This is significant inasmuch as on the death of a partner, as here, his right in specific partnership property vests in the surviving partner or partners, who have the right to continue to possess the partnership property for partnership purposes. (Deering's Cal. Civ. Code, Sec. 2419(2)(d), Appx., *infra*.) Since the deceased partner's interests in the specific assets of the two partnerships were already vested in them, for the purpose of carrying on the partnership business, the surviving partners would have acquired nothing not already possessed by them by the purchase of specific partnership assets, which belies the suggestion that they purchased assets and not partnership interests, in each instance, from the two partnerships. By the same token, the estate had no right whatever to specific partnership assets and, therefore, would have been unable to sell them prior to their distribution in termination of the partnership.

While the interests in the two partnerships held by the estate of the deceased partner were, in each case, purchased by the surviving partners, it is evident that no termination of the partnership business was contemplated, for, prior to such purchases, an understanding

had been arrived at between the five taxpayers herein with respect to the sharing of the costs of the partnership interests and the formation of the two limited partnerships which, subsequent to the purchase of the partnership interests, and on December 23, 1942, were formed by them for the purposes of continuing to carry on the subsistence contracting business of the California and Alaska partnerships [R. 210-211, Exs. 3 and 4]; and, as the District Court so vividly demonstrated [R. 64-66], the identity of the interests purchased from the estate of the deceased partner were preserved and may readily be followed into the two new limited partnerships.

Although a partner is a co-owner with his partners of specific partnership property holding as a tenant in partnership (Deering's Cal. Civ. Code, Sec. 2419(1), Appx., *infra*), his interest in the partnership is his share of the profits and surplus, and the same is personal property (Sec. 2420, Appx., *infra*). A partner's property rights consist of (1) his rights in specific property, (2) his interest in the partnership, and (3) his right to participate in the management (Sec. 2418, Appx., *infra*), and it is perfectly clear that all, and not just the first, of these rights were the subject of the agreement of December 11, 1942, for the purchase of the two partnership interests. [R. 75-79.]

Consistent with the evidence that *interests* in, and not specific contracts belonging to, the partnerships were purchased in the transactions in question, the District Court found [R. 84] that:

What ever contracts were in existence at the time of death of the deceased had no substantial value and had as a value only a small percentage of the value of \$100,000.00 contended for by plaintiffs.

This ultimate finding by the court is fully supported by its evidentiary findings, not questioned here, which disclose that the two partnerships had no contracts binding for any substantial period of time. On the contrary, the contract under which the activities of the Alaska partnership were conducted was terminable at the will of the Secretary of War. As to the California partnership, the longest contract which it had, namely, that relating to the operation of the post exchange fountain-grills at Camp Roberts, California, was terminable on 60 days' notice by either party; the contract for the operation of the post exchange fountain-grills at Camp San Luis Obispo, California, was similarly terminable on 30 days' notice; the contract with the California Shipbuilding Yards, Terminal Island, California, was terminable on 48 hours' notice; and there was no written contract covering the activities of the partnership at the Douglas Aircraft Plant in Long Beach, California. [R. 81-82.] The subsistence work carried on by the California partnership during the construction of the Basic Magnesium plant at Roysen, Nevada, was carried on entirely under purchase orders until July 1, 1943, at which time the first binding bilateral contract between the parties was executed. Only a few such purchase orders had been secured by the partnership prior to December 27, 1941, the date of the deceased partner's death. [R. 82-83, 89-90.] It is clear that these comprise no binding commitment of any real substance insofar as the subsistence work at the Basic Magnesium plant is concerned, since shortly after the death of the deceased partner it became necessary for the other partner, H. S. Anderson, Jr., to return to Nevada in order, as he testified [R. 162], "to attempt to resell McNeil Construction Company, and the Defense Plant Corporation on our ability to continue

on.” Insofar as the Basic Magnesium plant operation was concerned, as the District Court observed [R. 90], “very little beyond preliminary negotiations for the carrying on of a subsistence business had been consummated” at the time of the death of H. S. Anderson, Sr.

In addition to the fact that the contracts held by the two partnerships lack any such value as the taxpayers seek to attribute to them, the record discloses, contrary to their contention (Br. 21), that the interests of the decedent in the two partnerships reflected substantial tangible partnership assets. This appears from the adjusted balance sheet of the California partnership [R. 129, Ex. A], the adjustments to which were made by a revenue agent and consist of a substantial increase in the value of the net assets due to the restoration of certain equipment which had been charged to expense. [R. 110-111.] As the District Court noted [R. 63], “No proof whatever was offered on the value of the contracts assets at the time of the death of deceased or on December 11, 1942, or *what was the value of other assets*⁴ if the contracts had a value.” (Italics supplied.) Therefore, even if it could be concluded from the evidence as a whole

⁴The adjusted balance sheet of the California partnership [R. 129] discloses that the decedent's interest therein had an asset value of over \$71,500 and the District Court referred to this adjusted book value of the decedent's interest [R. 63, 85] as not including the contracts held by the partnership which were not listed as capital assets. Assuming, without conceding, that the \$71,500 included an advance of \$29,013.26 to the partnership by H. S. Anderson, Jr., which was paid back to his estate in addition to the \$75,000 paid for the partnership interest, as the taxpayers contend (Br. 26), that fact would be of no real significance. It is none the less incontestably clear that there were substantial tangible assets and the fair market value, not the book value, would necessarily be the governing factor as to what portion, if any, of the \$75,000 purchase price of the partnership interest related to tangible partnership property.

that the taxpayers acquired assets rather than the interests of the decedent's estate in the California and Alaska partnerships, it is clear that they failed to sustain their burden of proving facts essential to any recovery by them. This Court has held that a taxpayer seeking a depletion deduction (which, we submit, is comparable, for this purpose, to the amortization deduction sought here) has the burden of proving the exact amount of the deduction to which he is entitled. *Lamm Lumber Co. v. Commissioner*, 133 F. 2d 433, 434. Moreover, the decisions relating to the amortization of contracts make it quite clear that as a prerequisite to the allowance of such amortization, the taxpayer must prove value—that is, the basis attributable to the contracts for the purpose of computing depreciation—and must show that they are for a definite and limited period.⁵ *Hopkins v. United States*, 82 F. Supp. 1015 (Ct. Cls.); *Cook China Co. v. Commissioner*, 1 B. T. A. 254; *William Morris Enterprises, Inc. v. Commissioner*, 1 B. T. A. 946, 951-952. This the taxpayers here have failed to do.

⁵An Internal Revenue Agent, for the purpose of computing depreciation of physical equipment, estimated the useful life of all the various contracts and purchase orders held by the two partnerships in which the estate held interests at two years from December 31, 1941. [R. 55.] Consistent with this, the Government conceded that if the District Court determined that valuable contracts were purchased by the taxpayers, of a kind which could properly be depreciated over a period of time, then the years 1942 and 1943 would constitute the period over which they should be depreciated. [R. 139-140.] It is important to note that the arbitrary assignment of a two-year life to the contracts purely for convenience in the computation of depreciation on physical equipment was governed by different considerations and has no significance with respect to the totally different problem of examining each contract in connection with its evaluation, to determine whether it represented a binding commitment of any substantial duration.

Since, as we have observed, the two partnerships had no contracts containing binding commitments of any substantial duration, it is apparent that such expectations as the taxpayers may have entertained when they acquired the interests of the deceased partner's estate of profitably continuing the partnerships' subsistence businesses lay in the fact that they were buying into going concerns which were already on the ground, furnishing subsistence services to their customers, or with operations in progress, and were not a consequence of any contracts owned by the partnerships. The District Court was correct, therefore, in taking the view that the amounts by which the purchase prices paid for the two partnership interests by the surviving partners exceeded the value of the partnership shares which those interests represented in the tangible assets of the partnerships [R. 85], "if anything * * * [represented] good will or going concern value."⁶

The evidence establishes, as has been demonstrated above, that the surviving partners undertook to purchase the deceased partner's interests from his estate. As the Supreme Court said in *Bull v. United States*, 295 U. S. 247, 254:

Where the effect of the contract is that the deceased partner's estate shall leave his interest in the business and the surviving partners shall acquire it by payments to the estate, the transaction is a sale, and

⁶Perfectly consistent with this is the District Court's remark [R. 261], relied upon by the taxpayers (Br. 23-24), that "it would be fair to make a finding that the Anderson Brothers would not have paid the \$125,000" for the two partnership interests "if it had not been for the subsistence deals then existing" at San Luis Obispo, Camp Roberts, Basic Magnesium, Douglas Aircraft, and California Shipbuilding.

payments made to the estate are for the account of the survivors.

It is settled by the decisions of this Court that a partnership interest constitutes a capital asset upon which the determination of gain or loss must await the ultimate disposition of such interest. *Stilgenbaur v. United States*, 115 F. 2d 283; *Commissioner v. Estate of Gartling*, 170 F. 2d 73, affirming *per curiam* Tax Court decision of July 28, 1947 (1947 P-H T. C. Memorandum Decisions, par. 47,213); *Hatch's Estate v. Commissioner*, 198 F. 2d 26; *United States v. Snow*, 223 F. 2d 103, certiorari denied, 350 U. S. 831. And, expenditures for the acquisition of partnership interests are not subject to recovery by way of deductions from gross income. *Cf. Brown v. Commissioner*, 63 F. 2d 66 (C. A. 9th), affirmed on other grounds, 291 U. S. 193; *Edwards v. Commissioner*, 102 F. 2d 757, 759 (C. A. 10th); *Autenreith v. Commissioner*, 115 F. 2d 856, 858 (C. A. 3d); *Hill v. Commissioner*, 38 F. 2d 165, 168 (C. A. 1st), certiorari denied, 281 U. S. 761; *Kenworthy v. Commissioner*, 197 F. 2d 525 (C. A. 3d); *Watson v. Commissioner*, 82 F. 2d 345 (C. A. 7th).

The District Court correctly concluded that its disposition of this case must be controlled by the principles laid down by this Court in the *Stilgenbaur* case, *supra*, and similar decisions in *Commissioner v. Shapiro*, 125 F. 2d 532 (C. A. 6th), and *Thornley v. Commissioner*, 147 F. 2d 416 (C. A. 3d). [R. 66.] It rejected the case of *Blum v. Commissioner*, 5 T. C. 702, relied upon by the taxpayers (Br. 13-16), as not applicable to the facts in the present case, without expressing any opinion as to the correctness of the holding there. [R. 62-63.] The court's action in so doing was quite proper. The

Blum case involved a sale by one of two partners of his interests, including his interest in all the partnership assets, to the other, who thereafter conducted the business as a sole proprietorship. The assets of the sole proprietorship he, of course, owned in his own right, in contrast with a partner's interest in partnership assets, and, as the sole proprietor, he disposed of assets which he had acquired. This presented the problem of determining his basis of such assets for the purpose of the computation of the amount of income or gain or loss, as the case might be, resulting from these transactions. These features distinguish the *Blum* case from the one at bar, where the assets of the business continued to be partnership assets throughout, owing to the absence of any termination of the partnership business.

This Court has held that it is what was done and not what might have been done which controls. *Stilgenbaur v. United States*, 115 F. 2d 283, 286-287. These taxpayers, as the lower court pointed out [R. 66-67], might have purchased the specific contracts held by the two partnerships had they so desired. The undeniable fact remains, however, that they purchased partnership interests instead. The District Court observed that [R. 67-68]:

Plaintiffs have been represented here and in their dealings with the estate by able counsel. We conclude the actions of plaintiffs were taken advisedly and the alternatives above rejected.

Finally, the taxpayers' position is premised on one obvious fallacy. It is repeatedly suggested (Br. 10, 13-18) that if they are not entitled to recover their costs of the estate's interests in the California and Alaska partnerships by way of amortization deductions, they will be denied all right to recover such investments tax

free. But this argument is best answered by the District Court. The record discloses that the new limited partnerships in which the taxpayers were partners were terminated and dissolved on December 31, 1943. [R. 85-86.] However, the taxpayers have studiously avoided any claim to the benefit of the provisions relating to the determination of capital gains and losses. There was a complete absence of any evidence which would indicate whether the taxpayers realized a gain or loss upon the ultimate disposition of their investment in the two partnership interests purchased from the estate, as the trial court pointed out [R. 64]:

There was no dispute that the new partnerships were cancelled at the end of 1943. But there was no evidence of what was distributed on their dissolution or of any sale of the partnership or of the value as of that date of the whole of each partnership or of any particular per cent in either one. The Court cannot say what the value of the 75% and the 40% interests in the two partnerships were as of December 31, 1943. This would have been susceptible of proof. But plaintiffs chose not to consider that they had purchased an interest in each partnership which was a capital asset.

It is respectfully submitted that the District Court's findings that partnership interests were purchased from the estate of decedent, and not specific partnership assets, is amply warranted by the record and that the court correctly denied the taxpayers any deduction as expenses for amortization on account of the expenditures made by them in that connection.

Conclusion.

The District Court's judgments are correct and should therefore be affirmed.

Respectfully submitted,

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APPENDIX.

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

(a) [As amended by Sec. 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses*.—

(1) *Trade or business expenses*.—

(A) *In General*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * *

(2) *Non-trade or non-business expenses*.—In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection income, or for the management, conservation, or maintenance of property held for the production of income.

* * * * *

(1) [As amended by Sec. 121(c) of the Revenue Act of 1942, *supra*] *Depreciation*.—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

- (1) of property used in the trade or business, or
- (2) of property held for the production of income.

* * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

Deering's California Civil Code (1941 ed.):

SEC. 2418. *Extent of property rights of a partner.*
The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

SEC. 2419. *Nature of a partner's right in specific partnership property.* (1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) *The incidents of this tenancy* are such that:

* * * * *

(d) [*Survivorship*] On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

* * * * *

SEC. 2420. *Nature of partner's interest in the partnership.* A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

SEC. 2423. *Dissolution [Defined]*. The dissolution of a partnership is a change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

SEC. 2424. *Partnership not terminated by dissolution*. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

SEC. 2425. *Causes of dissolution*.—Dissolution is caused:

* * * * *

(4) By the death of any partner;

* * * * *

SEC. 2431. *Right to wind up*. Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court.

SEC. 2436. *Rights of retiring or estate of deceased partner when the business is continued*. When any partner retires or dies, and the business is continued under any of the conditions set forth in Section 2435 (1, 2, 3, 5, 6), or Section 2432 (2b) without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dis-

solution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided, that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by Section 2435(8) of this code.

United States Court of Appeals

FOR THE NINTH CIRCUIT

H. S. ANDERSON, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ETHEL H. ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ROBERT W. ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

GLORIA S. ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JOHN HARDY ANDERSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeals From the United States District Court for the
Southern District of California, Central Division.

REPLY BRIEF FOR APPELLANTS.

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No. 14796
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

H. S. ANDERSON, JR.,		<i>Appellant,</i>
	<i>vs.</i>	
UNITED STATES OF AMERICA,		<i>Appellee.</i>
ETHEL H. ANDERSON,		<i>Appellant,</i>
	<i>vs.</i>	
UNITED STATES OF AMERICA,		<i>Appellee.</i>
ROBERT W. ANDERSON,		<i>Appellant,</i>
	<i>vs.</i>	
UNITED STATES OF AMERICA,		<i>Appellee.</i>
GLORIA S. ANDERSON,		<i>Appellant,</i>
	<i>vs.</i>	
UNITED STATES OF AMERICA,		<i>Appellee.</i>
JOHN HARDY ANDERSON,		<i>Appellant,</i>
	<i>vs.</i>	
UNITED STATES OF AMERICA,		<i>Appellee.</i>

Appeals From the United States District Court for the
Southern District of California, Central Division.

REPLY BRIEF FOR APPELLANTS.

**The Partnership Interests Allegedly Purchased by
Plaintiffs Did Not Continue to Exist After the
Purchase.**

On page 22 of its brief the government states the issue
as follows:

“The fundamental controversy concerning the facts
presented to the court below is whether, by the ex-

penditures in question, the taxpayers purchased partnership assets consisting of certain contracts the cost of which was properly recoverable by amortization, as they contended; or whether they purchased a partnership interest, which is a capital asset not subject to depreciation, as the Government claimed.

* * *

The government states that plaintiffs purchased "*a partnership interest.*" It argues that the cost of a partnership interest cannot be allocated as the cost basis of assets owned by the partnership and recovered through depreciation or amortization deductions over the useful economic lives of such assets. Rather, the cost must remain as the cost of the intangible partnership interest; or as the government asserts (p. 19):

"* * * The cost of acquiring such interest is not recoverable through deductions from gross income but must await the determination of gain or loss *upon ultimate disposition of the interest.* * * *"
(Emphasis added.)

And the government's brief ends (p. 33) with the suggestion that gain or loss was computable at December 31, 1943, upon the "** * * ultimate disposition of their investment in the two partnership interests purchased from the estate * * *.*" (Emphasis added.)

This argument demonstrates the fallacy of the lower court's decision in the present case.

The partnerships that were dissolved at December 31, 1943, were the two *new* limited partnerships which were created by the five plaintiffs on December 23, 1942 [see the Findings at R. 86]. These partnerships were stipulated to be *new* partnerships [R. 55-56]; they were found

by the lower court to be *new* partnerships [R. 85-86]; and they were created one year after the decedent's death on December 27, 1941. Neither the decedent nor his estate ever owned any interest in such *new* partnerships.

It is obvious that the five plaintiffs could not and did not purchase an interest in the *new* partnerships from the decedent or his estate.

The only partnerships in which the decedent or his estate ever had any interest were the *old* partnerships which admittedly, under California law, were *dissolved* by the death of the decedent.

It is true that *dissolution* does not automatically *terminate* a partnership under California law. The partnership existence continues by statute “* * * until the winding up of partnership affairs is completed.” (Cal. Corp. Code, Sec. 15030.)

But the crucial point is that at some stage in the proceedings the separate existence of the old partnership did cease.

The *new* partnership created by the five plaintiffs was a separate partnership completely distinct from the *old* partnership.

The sum paid to the decedent's estate was not the purchase price of an interest in the *new* partnerships. It was the purchase price of the decedent's interest in the *old* partnerships.

The crux of this case can best be illustrated by assuming that the surviving partner *alone* had purchased the decedent's interest in the old partnership. It will be observed that it was the *sole* surviving partner in the old California partnership who agreed, *as such surviving*

partner, to pay \$75,000 into the decedent's estate. Let us assume he had done so and had continued the business as a sole proprietorship. It would have been clear in that event that the partnership interest purchased from decedent's estate would have ceased to exist, and there would have been no alternative but to allocate the purchase price as the basis of the business assets acquired.

The underlying principle, we respectfully submit, is not changed by the circumstance that the surviving partner, instead of making the purchase alone, interested four others in joining with him, and together they contributed the \$75,000 and formed a new limited partnership as the vehicle with which to continue the business.

The fact remains that the partnership interest purchased from the decedent's estate has ceased to exist, as effectively in the latter case as in the former, and the cost must be allocated as basis of the assets.

With respect to the *new* partnership, the cost is governed by the long-standing regulations of the Internal Revenue Service (Regs. 118, Sec. 39.113(a)(13)-1):

"The basis of property contributed in kind by a partner to partnership capital after February 28, 1913, is the cost or other basis thereof to the contributing partner. Annual allowances to the partnership for depletion and depreciation are to be computed on such basis. * * *"

We respectfully submit that what happened *as a matter of fact and as a matter of law* was as follows: the decedent's interest in the dissolved partnership was purchased either by the five plaintiffs individually for \$75,000 or by a new limited partnership which they had just created by contributing cash capital of \$75,000, which in

turn was paid into the estate. The old partnership thereupon was terminated and ceased to exist, and its assets were distributed in kind to the five plaintiffs or to the new limited partnership. In either event, the following rule of the regulations applies (Regs. 118, Sec. 39.113 (a)(13)-2):

“* * * If the partnership distributes its assets in kind and not in cash, the partner realizes no gain or loss until he disposes of the property received in liquidation. The basis of such property in the hands of the partner shall be such part of the basis in his hands of his partnership interest as is properly allocable to such property.”

Consequently, the property theretofore owned by the old partnership acquired a basis equal to the cost of \$75,000.

The parties to this action stipulated [R. 55] that the contracts and purchase orders owned by the old partnerships at the decedent's death had useful lives of two years, as determined by the Internal Revenue Agent.

With all due respect we submit that the government is here attempting to repudiate the action of its Internal Revenue Agent, in carrying out his official duties, as well as to repudiate the stipulation of facts entered into between the parties. The purpose of the stipulation that the contracts had a life of two years was to establish the period over which the value to be ascribed to such contracts should be amortized. We think the government is precluded from now contending, in the face of such stipulation, that the contracts did not represent binding commitments of any substantial duration (p. 18) or of any real substance (pp. 27, 29). We respectfully submit

that the stipulated facts must govern the decision of this case.

And we respectfully direct the Court's attention to pages 21-24 of our opening brief, quoting the uncontradicted evidence with respect to the value of the contracts and purchase orders which had a stipulated two-year life.

In reply to the suggestion throughout the government's brief that the purchase price was for good will or going concern value, we refer the Court to the statement in the lower court's Memorandum of Decision [R. 64] that the record shows that good will was not purchased, unless it was \$4,000.

None of the cases cited by the government on page 31 is applicable here. They held, under varying factual circumstances, that payments to retiring partners or the estates of deceased partners should be capitalized rather than expensed. But they did not consider the question presented here: that the capital expenditure, if the old partnership is dissolved and goes out of existence, should and must be allocated as the cost of the assets owned by the former partnership.

Conclusion.

In summary, we respectfully submit that under California law the old partnership was dissolved by the death of the decedent. Notwithstanding such dissolution the existence of the partnership continued, but solely for the purpose of winding up its affairs. The interest of the decedent was purchased by the plaintiffs and the plaintiffs then proceeded to conduct the business under a new limited partnership. This limited partnership was not the same partnership as the old partnership in which

the decedent had an interest. Under the regulations above quoted the new partnership had a certain basis for its assets, and that basis was the cost basis of the partners. Hence the new partnership was correct in amortizing the cost of those assets over the life of those assets. The asset owned by the new partnership was *not* an interest in the old partnership.

We respectfully submit that the lower court erred and its judgment should be reversed.

Dated at Los Angeles, California this 8th day of February, 1956.

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No. 14799

In the

United States Court of Appeals For the Ninth Circuit

GEORGE PEOPLES, *Appellant*,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court,
for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

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No. 14799

In the

**United States Court of Appeals
For the Ninth Circuit**

GEORGE PEOPLES, *Appellant*,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, *Appellee*.

BRIEF OF APPELLANT

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

**STATEMENT OF PLEADINGS AND FACTS
DISCLOSING BASIS FOR JURISDICTION**

This is an action at law for damages for an alleged breach of a contract of employment. The pleadings in the case were merged in a Pre-Trial Order (R. 4-37) in which it was stipulated that Plaintiff is a citizen of the State of Oregon, the Defendant a Delaware corpora-

tion and the amount in controversy, exclusive of costs and interest, in excess of \$3,000.00. (R. 4).

The District Court had jurisdiction under 28 U.S.C. Sec. 1332 (a) (1). This Court has jurisdiction of the appeal under 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

This action was brought by George Peoples, appellant, a railroad brakeman, against his former employer, Southern Pacific Company, appellee, to recover damages for a breach of appellant's contract of employment with appellee, allegedly resulting from his being discharged by appellee without being given notice of the specific charges against him and of the time and place of the formal investigation or hearing and without being given the opportunity to be present or represented at the hearing.

The parties, through their attorneys, approved and the Court made and entered a Pre-Trial Order which supplanted the pleadings in the case. (R. 4-37). This order contains a statement of certain agreed facts (R. 4-25); and statements of the contentions of the respective parties (R. 26-35).

Among the admitted facts were the following:

Appellant was employed by appellee as a brakeman

in its Portland Division in the State of Oregon from July 21, 1947, until November 24, 1952. (R. 15-16). On the latter date his employment was effectively terminated by appellee. (R. 18).

Appellee is a railroad engaged as a common carrier in interstate commerce. (R. 4). During the entire period of appellant's employment there was in effect a collective bargaining agreement between appellee and the Brotherhood of Railroad Trainmen (herein called BRT). (R. 5, 15). Appellant was employed subject to this agreement. (R. 15-16). Appellee and certain of its employees, including appellant, were subject to the terms and provisions of the National Railway Labor Act. (R. 4).

On August 29, 1952, appellant was working from the extra board maintained by appellee at Roseburg, Oregon. (R. 16). He resided in Ashland, Oregon. (R. 17).

Appellant was absent from work from August 29, 1952, until after November 24, 1952. (R. 19).

The collective bargaining agreement between appellee and BRT, Article 57 (b), provided that no employee could be disciplined or discharged without a fair and impartial investigation before a proper officer of the company at which the employee could be repre-

sented. Section (c) of the same Article stated that when a formal investigation was to be held that the employee should be given written notice of the specific charges and the time and place of the investigation sufficiently in advance to arrange for representation and witnesses. (R. 10).

On November 5, 1952, appellee directed a letter to appellant addressed to him at Neil Creek Road, Ashland, which stated that the records showed appellant had been absent without authority and that, if so, his absence was in violation of Rule 810 and, unless due to good and proper reason, was sufficient cause for termination, and that appellant was notified to appear for an investigation at Roseburg on November 18th. Appellant did not receive the letter and it was later returned to appellee unclaimed. A formal investigation was held on November 18th. Appellant was not present or represented. The trainmaster who conducted the investigation recommended that appellant be discharged for violation of appellee's General Rule and Regulation No. 810. The division superintendent concurred in the recommendation and appellant was removed from service effective November 24th. A letter sent by appellee to appellant dated November 24, 1952, advising of this action and addressed to the same address as the previous letter was returned to appellee unclaimed. (R. 17-19).

On the basis of the foregoing admitted facts appellant contended in the Pre-Trial Order that he had been discharged in violation of his contract of employment. (R. 26-27).

The appellee contended, first, that the appellant was employed under a contract of employment terminable at will by either party; second, that, in any event, the appellee had good cause of discharge for discharging the appellant for violation of General Rule and Regulation No. 810 and failure to comply with Special Notice No. 279 and for long continued absences from work; and, third, that appellee made every reasonable effort to locate the appellant and give him notice of the investigation held on November 18, 1952, and that this was in compliance with the collective bargaining agreement. Fourth and finally, the appellee contended that the appellant did not comply with the appeal procedure or time limitations set forth in the collective bargaining agreement with the BRT; that those procedures were exclusive and that the appellant was wholly barred and estopped by his delay and failure to comply with the grievance procedures of Article 58 of the collective bargaining agreement from maintaining an action for damages for an alleged breach of contract. (R. 33-36).

Appellant contended that appellee was not in any way excused from compliance with Article 57 of the

agreement and alleged that appellant had, on or about September 10, 1955, notified appellee's agent in charge at Ashland, the station agent, of his address; that by rule and practice of appellee he was required to report his address to the officer of appellee in charge at his home terminal; that it was through this agent that notices to employees were customarily sent; that appellee made no effort to ascertain his whereabouts through the persons most apt to know, the station agent and chief clerk at Ashland, and appellant's neighbors and landlord at Ashland; and that the notice of the hearing was not sent to appellant's last known post-office address in Ashland, P. O. Box 321. (R. 29-30).

The appellant, in the Pre Trial Order, contended that this action did not involve the issue of whether appellee had cause to discharge the appellant or whether he could have been justly discharged if the contract procedures had been followed. Appellant, however, admitted certain facts with respect to the merits of the discharge in the event that it was held that they constituted an issue in the case. (R. 30). In this connection it was agreed that General Rule and Regulation No. 810, which had been issued by the appellee before August 29, 1952, provided:

"Employees must not engage in other business without permission of the proper officer. They must not absent themselves from their employment without proper authority. They

must report for duty at the prescribed time and place, remain at their post of duty, and devote themselves exclusively to their duties during their tour of duty.

"An employe subject to call for duty must not absent himself from his usual calling place without notice to those required to call him." (R. 24).

Appellant admitted he had knowledge of this regulation (R. 25).

It was also agreed that Special Notice No. 279 was issued by the appellee on December 10, 1951, and provided as follows:

"Train, engine and yard service employes may not be absent for more than seven calendar days at one time without securing authority from Supervisor (Trainmaster, Road Foreman of Engines or General Yardmaster).

"Crew Dispatchers and others handling crew boards are not authorized to grant leaves for more than seven calendar days.

"In case of illness which may incapacitate an employe for more than seven days, it is necessary that proper advice be given to Supervisor, advice to include name of doctor attending, and written permission must be secured to cover leave.

"Leaves of absence should be anticipated as much as possible so they may be handled in orderly manner."

The appellant denied that he had notice of this special notice or that it was complied with or followed in the division. (R. 32).

Appellant alleged the following disputed facts:

On August 28, 1952, he learned that his father was critically ill in Nebraska and he was requested by a member of the family to come to Nebraska to see his father. He notified the crew dispatcher, who was in charge of the extra board at Roseburg, of these facts and was told that he could leave for this purpose on giving notice to that office. He gave such notice by telegram on August 29, 1952. He was required to be absent because of his father's illness until on or about December 1, 1952, at which time he reported to work and learned that he had been removed from service. On or about September 20, 1952, he had notified the station agent of appellee at Ashland of his address in Nebraska. He had received no notice to return to work. (R. 31-32).

Appellant also alleged that it was customary and accepted practice in the Portland division of appellee's operation for employees to lay off work for personal reasons for indefinite periods without securing any written leave of absence after seven days; that it was customary and accepted practice for employees who wished to lay off for personal reasons to notify the appellee that they were laying off "sick" and, in such cases, they were not expected or required to return to work until they were notified to do so and that such notice was customarily given through the agent of the

appellee in charge of the employee's home terminal which, in this case, would have been the agent at Ashland. Appellant also contended that other employees in the past had been absent for the same reasons for indefinite periods without disciplinary action being taken against them. (R. 30-32).

The following admitted facts appear in the Pre-Trial Order which are relevant to the contention of appellee that appellant failed to exhaust the grievance procedures of the collective bargaining agreement and that such failure is a bar to an action for damages:

Article 58 of the collective bargaining agreement is entitled "Limitation in Presenting Grievances". Sections (a) and (b) provided that the general committee of the BRT would represent all trainmen in the making of contracts, rates, rules, working agreements and interpretations thereof and that the right of the employee to be represented in the handling of his grievances by the BRT was conceded. (R. 13).

Section (c) prescribed time limitations in the presentation and processing of grievances in the following steps: (1) submission of claim in writing within 90 days of occurrence; (2) submission of written grievance to superintendent within 90 days from date of notice declining claim; (3) notice to superintendent of intention to appeal to higher officers within 90 days of latest

decision of superintendent declining claim; (4) submission to highest general officers of carrier designated to handle claims and discussed in conference with him within one year from date of superintendent's last letter denying claim, or date of letter of local chairman of BRT of intention to appeal the claim or case; or date of superintendent's last letter submitting proposed joint statement of facts; (5) proceedings for final disposition of the claim to be instituted within one year from date of highest officer's decision and officer notified, otherwise decision of highest officer final and binding. (R. 13-15).

Section (d) of this article provided that trainmen who were dismissed might be re-employed at any time; but would not be reinstated unless the case was pending in accordance with the provisions of section (c) of the Article. (R. 15).

After the appellant learned that he had been discharged, he and his representative, Marion Felter, an official of the United Railroad Operating Crafts, had certain correspondence with the appellee with respect to the discharge. On January 10, 1953, Felter wrote to appellee's superintendent asking for favorable consideration of reinstatement of Peoples and setting forth the purported facts with respect to the reasons for Peoples' absence. (R. 19). On January 12, 1953, the superin-

tendent replied to this letter and stated that he regretted there was nothing that could be done toward giving favorable consideration to permit Peoples to return to service. (R. 20). On March 3, 1953, Felter again wrote the superintendent, this time requesting an appointment to confer. (R. 21). An appointment was made for March 16th, which was not kept by Felter because he did not receive the notice of the appointment until too late to keep it. (R. 21-22). On March 19, 1953, Felter wrote the superintendent explaining why he did not keep the appointment and stating that there was more information that he wanted available before he discussed the matter and that if it appeared advisable he would again contact the superintendent for an appointment. (R. 22).

On August 29, 1953, the appellant, himself, wrote the superintendent asking whether it was possible for him to get reinstated and stating he would be grateful for it. (R. 22-23). Hopkins, the superintendent, replied to this letter on September 1, 1953, advising the appellant that he regretted there was nothing that could be done in regard to returning him to Southern Pacific service. (R. 23). On November 25, 1953, Felter addressed a letter to J. J. Sullivan, Manager of Personnel of the appellee, with a copy to the superintendent. (R. 23). A reply to this letter was made by

E. D. Moody, under date of January 6, 1954. Moody acknowledged receipt of Felter's letter of November 25, 1953, to Sullivan. He stated the case had been referred to Moody for reply since he had been designated the highest general officer pursuant to the provisions of the Railway Labor Act for the handling of disciplinary matters on appeal and that in reviewing the file it was found that no appeal had been taken from the superintendent's last decision within 90 days from its date and that under the terms of Article 58 of the agreement the claim was deemed to have been abandoned and was not properly before him for consideration. (R. 23-24).

The appellant contended in the Pre-Trial Order that he was not required to follow the procedures set forth in Article 58 of the agreement; that Article 58, considered with subparagraph (a) of Article 57 provided for a voluntary procedure only; that such procedure was preliminary to proceedings before the National Railroad Adjustment Board and not related to bringing an action for damages for breach of contract and that, in any event, the appellant was excused from using these procedures because of the acts and conduct of the appellee. (R. 27-28).

The District Judge, in his findings, held that the appellant was dismissed by appellee from service for

violation of Rule 810; that Article 58 of the collective bargaining agreement prescribed the steps which must be taken and the time limitations covering each step if the employee decides to challenge any action taken by the employer; that the appellant, by Felter's letter of January 10th, presented a written grievance to the superintendent challenging the validity of his dismissal; that this was accepted as compliance with Article 58 (c), Item 3, and that the claim was declined by Hopkins' letter of January 12th in accordance with Item 3 of Section (c), Article 58; that after January 12th no notice of intention to appeal to a higher authority was given to the superintendent; and that the appellant did not comply with the grievance procedure, including the time limitations included in the collective bargaining agreement. (R. 42-44).

The Court concluded that there was no genuine issue as to any fact or facts material to appellant's motion for summary judgment; and that the appellant could not recover under the applicable collective bargaining agreement because of the complete failure to comply with the successive steps set forth in the agreement, which steps are essential conditions precedent to the creation and maintenance of a cause of action. (R. 44-45).

SUMMARY OF ISSUES PRESENTED ON APPEAL

This appeal presents the following basic issues:

(1) Whether the exhaustion of the contract procedures provided in Article 58 of the collective bargaining agreement was a condition precedent to or a limitation on the maintenance of an independent civil suit for damages.

(2) If so, whether the exhaustion of such procedure by appellant was excused by the action and conduct of appellee.

(3) Whether there was a genuine dispute on material facts which precluded the entry of a summary judgment for appellee.

(4) Whether under the undisputed facts appellant was entitled to a summary judgment on the question of liability.

SPECIFICATION OF ERROR No. 1

The District Court erred in holding that the plaintiff could not recover in this action because of his failure to comply with the provisions of Article 58 of the collective bargaining agreement.

The District Court, in its Findings of Fact No. VI, found that Article 58 of the collective bargaining agree-

ment prescribed the steps which must be taken and the time limitations covering each step if an employee desired to challenge any action taken by his employer with respect to his employment and, in Findings VII, VIII, IX and X, found that the plaintiff, through his representative, on January 10, 1953, presented a written grievance to the superintendent which was accepted as compliance with Article 58, section (c), Item 3; that on January 12, 1953, the superintendent declined the claim and that after that date no notice of intention to appeal to a higher officer was given the superintendent in writing within 90 days. (R. 42-43). The Court concluded, in its Conclusion of Law No. III that the plaintiff could not recover because of his complete failure to comply with the successive steps set out in the agreement, which steps are essential conditions precedent to the creation and maintenance of his cause of action.

The issue raised by this specification of error was covered by the following points in appellant's Statement of Points on Appeal: 3. (Exceptions to Findings VII, VIII, IX and X); 4. (Exception to Conclusion of Law III); 5. (c), (d), (f), (g), (h). (R. 49-52).

In consideration of this specification of error certain preliminary propositions of law which have been recognized in actions of this kind should be noted.

Preliminary Propositions

1. Appellant's rights and duties are to be determined under his individual contract of employment or hiring with the appellee, which contract is subject to the terms and conditions of the collective bargaining agreement between the appellee and the BRT.

J. I. Case v. NLRB, 321 U.S. 332 (1944);

Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U.S. 437 (1955).

2. The collective bargaining agreement insofar as it relates to disputes and relations between the employer and the collective bargaining representative is subject to the applicable federal law governing labor-management relations in interstate commerce, in this instance, the National Railway Labor Act (45 U.S.C., Sections 151-163).

J. I. Case v. NLRB, 321 U.S. 332 (1944);

Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U.S. 437 (1955);

Slocum v. Delaware, L. & W.R. Company, 339 U.S. 239 (1950);

Olson v. Potlatch Forests, Inc., 200 F. (2d) 700 (C.A.-9; 1953).

3. Under Federal law the procedures and remedies under the NRLA, including the procedures before the National Railroad Adjustment Board, are exclusive in “disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules or working conditions”.

45 U.S.C., Section 153 First (i).

This section has been interpreted to mean that disputes whose settlement will have prospective as well as retrospective importance to the carrier and to its employees are within the exclusive jurisdiction of the National Railroad Adjustment Board.

Slocum v. Delaware, L. & W.R. Company, 339 U.S. 239 (1950).

It is well established that the reinstatement of an employee with restoration of seniority rights is a matter of prospective importance which falls within the exclusive jurisdiction of the National Railroad Adjustment Board and that a civil court does not have jurisdiction to enter a decree in a civil action to provide for reinstatement.

Slocum v. Delaware, L. & W.R. Co., 339 U.S. 239 (1950);

Walters v. C. & N.W.R. Co., 216 F. (2d) 332 (C.A.-7; 1954);

Keel v. Illinois Terminal R. Co., 346 Ill. App. 169, 104 N.E. (2d) 659 (1952);

Brook v. Chicago, R.I. & P.R. Co., 177 F. (2d) 385 (C.A.-8; 1949);

Broadly v. Ill. Cent. R. Co., 191 F. (2d) 73 (C.A.-7; 1951).

It has also been held that the administrative remedy provided by the National Railroad Adjustment Board in a civil action for damages for breach of contract are mutually exclusive and that where an employee has unsuccessfully sought reinstatement through the procedures of the NRAB he is barred from bringing an independent action for damages.

Michel v. L. & N.R. Co., 188 F. (2d) 224 (C.A.-5; 1951); cert. den. 342 U.S. 862;

Hecox v. Pullman Co., 85 Fed. Supp. 34 (D.C. Wash. 1949).

It is equally well established, however, that the availability of the administrative remedy under the NRLA does not exclude an independent action under state law for breach of an individual contract of employment of a particular employee.

Moore v. Illinois Central Railway Co., 312 U.S. 630 (1941);

Slocum v. Delaware, L. & W.R. Company, 339 U.S. 239 (1950);

Transcontinental and Western Air, Inc. v. Koppal, 345 U.S. 653 (1952).

In the Koppal case cited above, the Court, after quoting from the decision in the Slocum case, concluded that the National Railroad Adjustment Board did not have exclusive jurisdiction over the claim of the employee that he was unlawfully discharged. The Court stated:

“Such employee may proceed either in accordance with the administrative procedure prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover as he did in the *Moore* litigation, *supra*, under Mississippi law.

“On the other hand, if the applicable law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so * * *.” (at Page 661.)

Under these established principles, appellant's rights under his individual contract of employment and the interpretation of that contract are to be determined under the law of the State of Oregon, in which the contract was made and to be performed. (R. 15).

Point: Under the law of Oregon an employee who has been discharged by his employer contrary to the provisions of his contract of employment has a cause of action for damages and in such action may recover as damages the loss of wages he has suffered, both past and prospective.

Quick v. Swing, 53 Or. 149, 99 Pac. 418 (1909);

Doolittle v. Pacific Coast Safe and Vault Works, 79 Or. 498, 154 Pac. 753 (1916).

Point: Under Oregon Law appellant was not required to use or exhaust the procedures provided for in Article 58 of the Agreement.

a. There is no Oregon decision on the precise issue in question. The appellant will rely on Oregon statutes and decisions relating to the construction of contracts and the effect given to contract provisions limiting the right to maintain actions for breaches of contracts.

The Trial Court, in its opinion, in holding that an employee must exhaust his administrative remedies in an employment contract before he can maintain an action for an alleged breach of such contract, referred to its decision in an earlier unreported case in which it had relied on the case of *Beck v. General Insurance Company*, 141 Or. 446, 18 P. (2d) 579 (1933). The *Beck* case was an action on a liability insurance policy.

The policy contained the condition that no action would lie against the company to recover on any claim unless brought within two years of final judgment against the insured. The Court held that this provision was not unreasonable and was therefore valid and precluded recovery by the plaintiff. The present case involves different problems and considerations than the *Beck* case. In the *Beck* case there was no question of interpretation since the condition was explicitly stated in the agreement. The issue was whether the condition was valid and enforceable. The condition was of a different character than the one in the present case. For reasons that will be hereinafter pointed out, in the instant case the use of the grievance procedure was not made a condition to maintaining a civil action and, even if so construed, constituted not simply a time limitation but an arrangement for arbitration which was unenforceable under Oregon law.

In the proceedings below the appellee had contended that (1) the appeal procedure provided in the collective bargaining agreement is exclusive and (2) that appellant was estopped and barred from maintaining an action for damages by his delay and failure to comply with the grievance procedure set forth in Article 58 and that he may not assert the instant claim against

appellee because he had not complied with Article 58. (R. 34-36).

The Court below did not explicitly find or conclude that the contract procedure was exclusive but did explicitly hold that exhaustion of it was a condition precedent to liability for damages. In its opinion the court referred to the *Beck* case which was a case involving the application of a provision which was a limitation on the remedy.

The court also cited the case of *Barker v. Southern Pacific Company*, 214 F. (2d) 918 (CA-9; 1954). In the *Barker* case, which arose under the law of California, the agreement provided that any employee who was to be dismissed should be given notice in writing of the reason or cause and that, if dissatisfied, he should be given a fair and impartial hearing upon written request before the expiration of 10 days from notice of dismissal. Plaintiff had failed to file the written request within the ten day period. The Court held that plaintiff had no cause of action for damages for discharge because the conditions required to be performed by him before he could claim a breach of contract had not been fulfilled. The Court stated:

“* * * Only if the company failed to accord to appellant the hearings provided after notice or by arbitrary disposal of his claim would there have been a breach of his contract. * * *”
(at Page 919.)

In the *Barker* case, therefore, the employee was required to give the notice before any obligation on the part of the employer came into being. Giving the notice was, therefore, a condition precedent to performance of a promise on the part of the employer. In the present case the initial promise to be performed was that of the employer: the promise to give the employee notice of charges and a formal investigation before dismissal. There was no condition precedent to be performed by the employee before this duty arose or its breach took place. The use of the procedure provided for in Article 58 could not have preceded this breach. It could only have followed it. Therefore, if use of the grievance procedure is a pre-requisite to recovery, it must be because it is a limitation on or a condition precedent to the remedy.

b. Under Oregon law governing the construction of contracts, the provisions of the collective bargaining agreement relating to use of the grievance procedure were not a condition precedent to or limitation on appellant's bringing an action for damages for breach of his contract of employment.

First, certain general rules of construction should be observed.

The agreement must be construed as a whole and

all the relevant provisions construed together to arrive at their true meaning.

“In the construction of an instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all.”

ORS 42.230.

To imply a condition precedent in an agreement is disfavored in the construction of contracts and the intention of the parties to impose such a condition should be made clear in the agreement.

Kelp Ore Co. v. Brooten, 129 Or. 357, 277 P. 716 (1929).

The provisions of the collective bargaining agreement material to the question under discussion are found in Articles 57 and 58 of the agreement. The sections most directly relevant are Section (a) of Article 57 and Sections (c) and (d) of Article 58. Since these Articles are set forth verbatim in the record on pages 9 to 15, inclusive, they will not be repeated here.

Section (a) of Article 57 is a basic section which gives to each employee the right to present a grievance, personally, or through a union committeeman, to the

superintendent. By its terms it covers any type of grievance, and is not limited to disciplinary or discharge cases. The remaining sections of Article 57 give each employee the right to a formal investigation before being disciplined or discharged and prescribe the procedure for this investigation. (Section (a) presumably entitles an employee disciplined or discharged under the procedures of Section (b)-(k) to present a claim or grievance to the superintendent if he is dissatisfied with the treatment given in the disciplinary proceeding.)

The provisions of Article 58, including section (c) thereof, should, therefore, be construed with the provisions of Article 57, Section (a) in which the right to present a grievance is given and which defines the basic meaning of the right. Article 57, Section (a) is general and Article 58 (c) provides the details and time limitations in certain types of cases, namely, time claims and disciplinary cases.

Article 57 (a) gives the employee the right to present a claim but does not require him to do so for any purpose. It states he "*shall have the right to present his case*" and that the superintendent's decision "*may*" on written notice to the Superintendent, be appealed to the General Manager or his designated representative." (Emphasis supplied.) This section

makes no reference to a civil action by the employee. It does not in any way suggest that such an action may not be brought or that it cannot be brought until after the grievance procedure has been followed.

Likewise, Article 58 contains no express reference to an independent action for damages. This article does state in section (c), Items 2, 3 and 5 that if "claims" and "disciplinary cases" are not submitted in the manner and within the time provided they shall be deemed abandoned. Item 6 provides that the decision of the highest officer designated by the carrier shall be final and binding unless within one year after his decision "proceedings for final disposition of the claim" are instituted by the employee or his representative and the officer is notified.

The agreement does not define the terms "claim" or "disciplinary case," as used in the agreement. Nor does it define the word "proceedings" used in Item 6. It is submitted that the meaning to be given these terms must depend upon the context in which they occur and in light of the purposes and intentions of the parties. So construed, they cannot be held to include within their meaning an independent suit for damages for wrongful discharge. On the contrary, other provisions of the agreement make clear that the claim of a discharged employee made through the contract procedure

is a claim to reinstatement and not a claim for damages for alleged wrongful discharge.

Section (d) of Article 58 provides:

“Trainmen who are dismissed may be re-employed at any time; but will not be reinstated unless case is pending in accordance with provisions of Section (c) of this Article.”

The distinction between a claim for damages and a claim for reinstatement is a clear and important one. Reinstatement is a remedy that can be granted only by the employer with the consent of the collective bargaining representative or through the processes of the NRAB. It cannot be granted by the decree or judgment of a civil court except in an action to enforce an award of the NRAB.

See cases cited on pages 17-18 of this brief.

Reinstatement connotes a resumption of the employment relationship and restoration of seniority rights and therefore affects the future relations of employer, employees and the collective bargaining representative. It involves collective rights and duties arising under the collective bargaining agreement. The damage claim arises out of the rights of the individual employee only. It presupposes a termination of the employment relationship.

"Our holding here is not inconsistent with our holding in *Moore v. Illinois Central R. Co.*, 312 U.S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A commonlaw or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

Slocum v. Delaware, L. & W.R. Co., 339 U.S. 239, 244 (1950).

The conclusion that the provisions of Article 58 (c) were directed to the reinstatement remedy and not the damage remedy is strengthened by the fact that they were patently designed to meet the requirements of the NRLA for submission of the dispute to the NRAB. These requirements are stated in 45 U.S.C., Sec. 153, First, (i):

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, *shall be handled in the usual manner up to and including the chief operating*

officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (Emphasis added.)

The word "proceedings" in Item 6 of Article 58 (c) appears to refer to such proceedings.

This intention is further disclosed by the letter of Mr. E. D. Moody under date of January 6, 1955. (R. 23-24).

As has been previously observed, the NRAB has the exclusive jurisdiction to award reinstatement.

See cases cited on page 18 of this brief.

It is submitted, therefore, that (1) there is no language in the agreement which makes the contract procedure for reinstatement either exclusive or a necessary condition precedent to or limitation upon maintenance of an independent action for damages; (2) such a condition cannot be reasonably implied from any language in the agreement; (3) on the contrary, the language of the agreement clearly indicates that use of the contract procedure was intended to be related to the reinstatement remedy only.

c. The procedure provided for in Article 58, section

(c) is, in essence, an arrangement for arbitration and, as such, is unenforceable under Oregon law.

As urged above, the grievance procedure of Article 58 is patently designed to be preliminary to proceedings before the National Railroad Adjustment Board. This Board has, under the statute, the authority to conduct what amounts to compulsory arbitration. If this interpretation is correct, then the appellee's contention amounts to an assertion that the appellant must go through this arbitration procedure before he can bring an action at law. In fact, in the proceeding below, the appellee contended that the grievance procedure was exclusive. While the United States Supreme Court has held in the *Moore, Slocum* and *Koppal* cases, cited on pages 16, 18 and 19 of this brief, that the remedy before the National Railroad Adjustment Board is not exclusive as a matter of Federal law, appellee seeks to make it such as a matter of contract.

However, under the common law of Oregon, a general arbitration agreement could be revoked at any time before an award was made.

Ball v. Doud, 26 Or. 14, 37 Pac. 70 (1894);

Shepard & Morse Lumber Co. v. Collins, 198 Or. 290, 256 Pac. (2d) 500 (1953).

The Oregon arbitration statute cannot be applied to

the present case to make a general agreement to arbitrate valid since the case involves a collective bargaining agreement.

“All persons desiring to settle by arbitration any controversy, suit or quarrel, *except such as respect the title to real estate or the terms or conditions of employment under collective contracts between employers and employes* or between employers and associations of employes, may submit their differences to the award or umpirage of any person or persons mutually selected.” (Emphasis supplied.)

ORS 33.210.

The steps in the collective bargaining agreement which are preliminary to a submission to the National Railroad Adjustment Board amount, in effect, to interim arbitration by certain designated officials of the employer with the right of appeal in the succeeding steps to the superintendent and the general manager or highest designated officer and, ultimately, to the National Railroad Adjustment Board. Each of the several steps is concerned with the entire merits of the dispute and contemplates a decision with respect to the merits of the dispute. The arrangement is not, therefore, a limited arbitration or an appraisal.

Shepard & Morse Lumber Co. v. Collins, 198 Or. 290, 256 Pac. (2d) 500 (1953).

d. Under the decisions of many states an employee discharged in breach of a contract of employment may maintain an independent suit for damages without having pursued grievance or appeal procedures provided in his contract of employment. It is submitted that the reasoning and results of these decisions are more consistent with the decisions of the Federal courts which are cited on pages 17-19 of this brief. The decisions in these states give effect to the distinction between the damage remedy and the reinstatement remedy. They protect the rights of the individual employee who may otherwise be caught in the vise of a procedure administered by his employer and a union which might not be sympathetic to his cause. They prevent the employee from being deprived of a basic civil remedy or of being subjected to a long delay in the exercise of that remedy. Among the decisions in which it has been held that the use of the contract remedy is not required as a prerequisite to a damage action are the following:

Georgia;

Central Georgia Railway Company v. Culpepper,
209 Ga. 844, 76 S.E. (2d) 482 (1953);

District of Columbia;

Condol v. B. & O. R. Co., 199 F. (2d) 400 (C.A.-D.C.; 1952);

Illinois;

Keel v. Illinois Terminal R. Co., 346 Ill. App. 169, 104 N.E. (2d) 659 (1952);

Louisiana;

Gould v. L. & O. R. Co., 203 F. (2d) 238 (C.A.-5; 1953);

(Louisiana statute of limitations of one year applied from date of discharge.)

Texas;

Thompson v. Moore, 233 F. (2d) 91 (C.A.-5; 1955);

Mississippi;

Dufour v. Continental Southern Lines, Inc., Miss. 68 So. (2d) 489 (1953).

In the Dufour case cited immediately above, the following language appears in the Court's opinion:

"It is further argued by the appellee that even if it be conceded that the discharge of the appellant for the violation of the rule was not justified, the appellant is precluded from recovery because he did not exhaust all of the administrative remedies provided in Section 3 of Article X of the aforesaid collective bargaining agreement. This section provides a procedure by which a discharged employee may obtain an investigation as to the justification of his discharge and for demanding in writing within fifteen days from the date of notification of his discharge a hearing, and for appeals, and providing that the failure of the appellant to comply with this provision of the agreement constitutes a waiver and forfeiture of any claim. It is said by the appellee that this provision of the agreement was not complied with and that, therefore, the appellant is

precluded from recourse to the courts by suit to recover damages for his wrongful discharge. *This is not a proceeding by the appellant seeking restoration to his employment. It is a suit for damages occasioned by his alleged wrongful discharge, and one in which his personal rights and property rights are involved.* The contention of the appellee that the appellant is precluded by his failure to first exhaust administrative remedies provided in the collective bargaining agreement has been expressly decided by this Court adversely to such contention in the case of *Tri-State Transit Company of Louisiana v. Rawls*, 191 Miss. 573, 1 So. (2d) 497, wherein the Court held that 'the plaintiff is not required to exhaust these administrative remedies as a prerequisite to recourse to the courts by suit to recover damages for an unjustified discharge,' citing the case of *Moore v. Illinois Central Railroad Co.*, 180 Miss. 276, 176 So. 593." (Emphasis added.) (at Page 494.)

In the case of *Barker v. Southern Pacific Company*, 214 F. (2d) 918, which is discussed on page 22 of this brief, this Court, in deciding a case which arose in California, affirmed the summary judgment of the District Court in favor of the defendant, a railroad company. The facts of that case are different from those of the present case since in that case the employee had failed to comply with a condition which was a condition precedent to the performance of the promise on the part of the employer, while in the present case the employer had breached its agreement by failing to give notice and hearing before the discharge. In addition to the language quoted from the *Barker* decision on page 22 of this brief, the

following language of the Court's opinion is relevant to the present question:

"The wording of Rule 25 appears to us to require the timely *filing* of the request for hearing as a prerequisite to any further proceedings under the contract, or any possible appeal to the courts of law. Rule 25 (i) provides for the 'further handling' of a grievance in the event that the prescribed contract procedure is carried to completion without success by an aggrieved employee, hence it would seem that Rule 25 might embrace both administrative procedure, and possible recourse to the courts. It is our view that the filing of a request (under the contract) for a hearing, is intended to be a condition precedent to both procedures above referred to.

"It is argued by appellant that notwithstanding the contractual provisions, an employee need not exhaust his administrative remedies unless required so to do under the applicable state law. It is questionable whether this doctrine is applicable, where, by contract, the request for a hearing has been made a condition precedent to the bringing of a lawsuit. *Wallace v. Southern Pacific Co.*, 106 F. Supp. 742 (21 Labor Cases, P. 66,882). But even if such is the correct doctrine, California law would be applicable and controlling. See *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (23 Labor Cases, P. 67,639). It is clear by that law that administrative remedies must be exhausted prior to taking recourse to the courts. 2 Cal. Jur. 2d 304, *et seq.* Admin. Law § 184, *et seq.* and cases cited therein. Since this issue involves a pure question of law it is properly open to decision on this appeal." (at Pages 919-920.)

It can be seen from the above language that in the *Barker* case the court did not decide whether the grievance procedure in that agreement was a necessary pre-

liminary to both administrative procedure and recourse to the courts.

There are a number of decisions from other states holding that the administrative procedure must be exhausted. These states include California, as noted in the *Barker* decision quoted above, and Missouri, as noted in the case of *Transcontinental and Western Air, Inc. v. Koppal*, 345 U.S. 653 (1952). The cases so holding which the writer has found and examined did not involve a factual situation such as the one here in which the employee had been discharged without a notice and hearing required by the agreement. The importance of this factual distinction will be discussed in the next specification of error. Also, these decisions did not consider the distinction between the reinstatement remedy and the damage remedy which was noted by the Court in *Dufour v. Continental Southern Lines, Inc.*, Miss. 68 So. (2d) 489 (1953), cited immediately above and which has been developed in this brief.

SPECIFICATION OF ERROR No. II

The District Court erred in failing to find and conclude that the appellee's breach of its contract of employment with appellant was of such character and importance that it excused any compliance by appellant with the provisions

of Article 58 which might otherwise have been required.

This specification covers matters raised by the following points of appellant's Statement of Points on Appeal: Point 5 (b) and (c) and Point 6 (a), (e) and (i) (R. 49-51). Under this specification appellant is assuming, for purposes of argument only, that Article 58 can be construed so as to require a discharged employee to exhaust the procedures of the Article in order to maintain an independent action for damages.

Appellant's position on this point is that he was excused from following the procedure because of appellee's conduct, specifically the following conduct: Appellee engaged in the initial breach of the contract of employment by failing to accord appellant a proper investigation after appropriate notice (R. 17-18); Appellee did not give appellant official notice of his discharge and the reasons therefor within 30 days of his dismissal (R. 18). When appellant, through Mr. Felter's letter of January 10, 1953, made a request for reinstatement, he was informed that there was nothing that could be done toward "giving favorable consideration to permit Mr. Peoples to return to service for the Southern Pacific Company". (R. 19-20). Later, when appellant wrote directly to Mr. Hopkins, he was again advised that there was nothing that could be done regarding the possibility of being returned to Southern

Pacific service. (R. 22-23). The appellee, after learning of Mr. Peoples' return and availability, made no effort to give him a copy of the decision resulting from the investigation or to afford him the hearing which he had missed. Instead, the appellee advised him in rather blunt language that it had no intention of giving his case any consideration whatsoever or of offering him re-employment, let alone reinstatement with full seniority rights.

There were no specific facts, admitted or alleged, in the Pre-Trial Order setting forth any excuse on the part of the appellee for not having given the appellant notice of the charges and hearing. The appellee did contend that it made every reasonable effort to locate the appellant and give him notice and that this was in compliance with the collective bargaining agreement. (R. 34). However, the appellant in his contentions had alleged specifically that he had given his address to the station agent at Ashland on September 10th; that by rule and practice of the appellee he was required to report his address to that agent, and that notices of this type were customarily given employees through the agent or chief clerk of the employee's home terminal, in this case, Ashland; that appellee did not send the notice to appellant's last known post-office address; and that the appellee did not attempt to learn

of appellant's address or whereabouts from his neighbors or landlord or from the agent or chief clerk at Ashland. (R. 29-30).

These allegations of specific facts were denied by the appellee.

It is submitted, however, that the mere general assertion on the part of the appellee that it had made every reasonable effort to locate appellant was not a sufficient allegation of facts which would constitute an excuse of appellee's failure to comply with the terms of the agreement. In any event, the most that can be said for appellee on this point is that there was a genuine issue with respect to material facts essential to appellee's case which should have prevented the entry of a summary judgment.

In discharge cases the collective bargaining agreement in Article 57 prescribes the mechanics for effecting the dismissal of an employee. Article 58 then sets forth the mechanics by which the employee may secure a review by higher officials of the carrier of action taken under Article 57 for the purpose of securing reinstatement. (R. 10-15). The initial steps in the entire procedure are those to be taken by the employer pursuant to Article 57. Where the initial steps have not been taken, there is nothing which can be properly reviewed on appeal. The agreement contemplates that the employee

will make a record in reply to the charges against him at the formal investigation and that the officers will review that record on appeal. Here no record was or could be made. Moreover, the appellee knew that appellant was not present or represented at the hearing. Appellee did not offer to rectify that omission and give appellant a chance to make a record. On the contrary, it refused to give him any consideration whatsoever.

In similar cases which have been decided by the NRAB it has been consistently held that where an employee has been disciplined without proper investigation, the employee is relieved from complying with the grievance procedure.

“Where an employee is disciplined without a proper investigation, such purported discipline is a nullity, of no force and effect, and a failure to appeal within the stipulated period for appeal cannot validate the void discipline. Thus, Award No. 5166 states, ‘the purported dismissal was of no force and effect and a failure to appeal cannot validate the void dismissal.’ Award No. 1055 states: ‘The claimant in this case was dismissed from service without having been charged with an offense and without a hearing. His failure to immediately protest his dismissal cannot condone its impropriety.’ ”

“Also, Award No. 9561 holds: ‘It cannot be that what occurred there was the fair and impartial hearing contemplated by the agreement. It was, in fact, no hearing and the awards of this Division which hold that objections to methods employed in investigations and hearings must, if later relied on, have been made at the time used, do not apply to cases where there is a total absence of any hearing or proper investigation.’ ”

Lazar, "Due Process on the Railroads: Disciplinary Grievance Procedures before the National Railroad Adjustment Board, First Division," Institute of Industrial Relations, University of California, Los Angeles (1953), p. 8.

A case very similar on its facts to the present case is that of *New Orleans Public Belt R. Comm. v. Ward*, 195 F. (2d) 829 (CA-5; 1952). This was an action to enforce an order of the NRAB awarding appellee reinstatement with appellant carrier. Mrs. Ward had been granted an indefinite leave of absence. Before she applied for reinstatement her name had been taken off the seniority list at the request of the union. When she applied for reinstatement, it was refused. Section VI, Rule 2 (a) of the collective bargaining agreement provided that no employee should be disciplined or dismissed without an investigation. Before the NRAB and the Court, the carrier contended that Mrs. Ward had failed to comply with Rule 1 (a) of the section which provided that should an employee desire to make a complaint on account of unjust treatment or violation of any of the provisions of the agreement, he must make such a complaint to the head of his department within 24 hours of the occurrence.

The Court stated that while it wasn't clear that either rule applied to a case of requested reinstatement after layoff that if either rule applied it was 2(a).

The Court then stated:

“While we recognize the requirement that relief be sought through any applicable procedure outlined in the contract as a prerequisite to resorting to the Adjustment Board, we think that there was no failure on Mrs. Ward’s part to meet that requirement.”

Under general principles of contract law, performance of a precedent condition by a promisee-plaintiff may be excused by conduct of the promisor-defendant where such conduct prevents performance of the condition by the promisee or amounts to a repudiation of the promise.

12 *Am. Jur.*, “Contracts,” Secs. 328-330;

Longfellow v. Huffman, 49 Or. 486, 491-492, 90 P. 907 (1907);

Winklebleck v. City of Portland, 147 Or. 226, 239-240, 31 P. (2d) 637 (1934);

Gabriel v. Corkum, 183 Or. 679, 691, 196 P. (2d) 437.

Likewise, the performance of a condition precedent to maintaining a legal action on a broken promise may be similarly excused.

1 *Am. Jur.*, “Actions,” Sec. 34;

Ringo v. Automobile Insurance Co., 143 Or. 420, 22 P. (2d) 887 (1933).

(Denial of liability within period prescribed for

proof of loss held to excuse such proof as condition to maintaining action.)

The conduct of appellee in the present case made the use of the appeal procedure of Article 58 useless and futile. The original discharge of appellant and the conduct of appellee subsequent thereto certainly amounted to a repudiation of its promise to give appellant a fair and impartial hearing.

There are sufficient facts alleged in the Pre-Trial Order to suggest that appellee did not act in good faith at any stage of appellant's dismissal; that it wasn't intended that appellant receive notice of the charges and hearing and that thereafter it was never intended that his claim for reinstatement be given any consideration. It can certainly be said that the record is sufficient to show that use of the grievance procedure by the appellant would have been entirely futile, and would have served no useful purpose.

The most that can be said for use of the procedure is that it would have given appellee, through its higher officials, the opportunity to correct any mistake made by the trainmaster. However, the record already shows that it would have served no such purpose since the superintendent refused at the first stage of the grievance machinery to give appellant any consideration. At that

point it would have been appropriate to afford appellant the hearing to which he was entitled. He could then have made proper use of the grievance procedure. As it was, he was entirely justified in abandoning further the pursuit of a futile and useless appeal.

It is significant that decisions which are noted earlier in this brief in which it was held that the employee did not have a cause of action because he did not exhaust his administrative remedies are decisions in which the plaintiff was given a proper investigation or in which he failed to request an investigation as provided by the agreement. The present case is, therefore, to be distinguished on its facts from those decisions.

SPECIFICATION OF ERROR No. III

The District Court erred in granting appellee's motion for summary judgment and in entering a judgment against the appellant.

This specification covers appellant's Appeal Point No. 1 and that part of Point No. 3 which excepted to the Court's Finding of Fact No. V, and that part of Point No. 4 which excepted to the Conclusion of Law No. IV.

The entry of the summary judgment against appellant and in favor of appellee was erroneous for the reasons stated in Specifications of Error Nos. I and II.

It was also erroneous for the reason that there were genuine issues of material fact which precluded entry of such a judgment.

In the argument of Specification of Error No. II we have urged that the appellee was not excused from giving appellant notice and hearing as required by the agreement; that no specific facts were alleged which would constitute an excuse for failure to give the notice of hearing and, as stated at that point in the brief, the most that can be said for appellee's position is that there were disputed facts with respect to this essential question.

The Court, in its finding No. V. (R. 42) stated that the appellant was dismissed by the appellee from its service for violation of Rule 810 of the transportation department which prohibits employees from leaving or remaining away from their employment without proper authority. It is not clear whether the Court intended by this finding to pass upon the merits of the charges against the appellant. Possibly the Court merely intended to state that this was the reason given by the appellee or that it was the purported reason for the action taken. If, however, the Court intended to find that the appellant was discharged for cause, as contended by the appellee, then the Court disregarded a number of genuine issues of material fact. The con-

tentions of the appellant with respect to the merits of his discharge are stated in the Pre-Trial Order, pages 30-32, and are summarized in this brief at pages 8-9. These contentions, if correct, would support a finding that the appellant was not discharged for the purported reason given or that his discharge was unjust and contrary to the provisions of his contract of employment in that his absence was in accord with established custom and practices and was not contrary to any regulation of which the appellant had notice. There was also a disputed issue of fact on whether the appellant had notice of Special Notice No. 279 which had been issued by the appellee and whether the provisions of that notice were effective in the division.

To the extent that the judgment order depends upon the Court's Finding of Fact No. V, the judgment was erroneous and contrary to law.

SPECIFICATION OF ERROR No. IV

The District Court erred in denying appellant's motion for summary judgment.

The undisputed facts before the lower court provided all the essential elements of an action for breach of contract against the appellee.

It was admitted that the appellee breached its un-

equivocal and unconditional promise to appellant that it would not discharge or discipline him without first notifying him of the specific charges against him and giving him a fair and impartial hearing. (R. 10).

This was breach of duty which was actionable unless Article 58 of the collective bargaining agreement imposed some valid limitation on appellant's right to maintain an action. In Specifications of Error numbered I and II we have urged that Article 58 did not constitute a valid limitation and that, even if it did, the performance by appellant of the terms of the article was excused.

If this view is correct, then all the elements of appellant's case were undisputed except the proof of damage. Appellant was, therefore, entitled to a summary judgment on the question of liability.

There is only one issue of which it could be plausibly argued that there was a dispute of material facts with respect to appellee's breach of duty. That is the issue of whether appellee was legally excused from giving appellant the notice and hearing required by the contract. Such excuse would, we believe, be a matter of affirmative defense to be alleged and proved by appellant. As developed in the argument of Specification of Error Number II on pages 38-39 of this brief, appellee

did not sufficiently allege such a defense. Appellee's only allegation on this point was the conclusion stated as a contention in the Pre-Trial Order that it made every reasonable effort to locate appellant and give him notice and that this was compliance with the agreement.

Respectfully submitted,

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No. 14,799

In the
United States Court of Appeals
For the Ninth Circuit

GEORGE PEOPLES,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellee.

Brief for Appellee

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In the

United States Court of Appeals

For the Ninth Circuit

GEORGE PEOPLES,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellee.

Brief for Appellee

APPELLEE'S STATEMENT OF THE CASE

This action was brought to recover damages for an alleged wrongful discharge of appellant, a trainman (brakeman) employed by appellee under a collective bargaining agreement. On March 7, 1955, a Pre-Trial Order was signed and filed (R. 4-37), showing without dispute the following: (1) appellant's employment was governed by the collective bargaining agreement between appellee and the Brotherhood of Railroad Trainmen, dated December 16, 1939, (hereinafter generally referred to as "the Agreement") (R. 5-15, 39, 43, 44); (2) appellant was absent from work from August 29 until November 24, 1952, when he was dismissed from the

service of appellee for violation of company rules prohibiting absence from duty without proper authority (R. 17, 18, 42); (3) Article 58 of the agreement entitled "Limitation in Presenting Grievances" prescribes the steps which must be taken, and the time limitations governing each step, if the employee desires to challenge any action taken by the employer (appellee) with respect to his employment (R. 13-15, 42); (4) in accordance with the requirements of Article 58(c), Item 2, (R. 13) and within the prescribed 90-day period next following November 24, 1952, appellant, through his union representative (R. 40; appellant's brief, page 10), on January 10, 1953, filed a written grievance with Superintendent L. P. Hopkins, contending that the dismissal was improper; (R. 19, 40, 43); (5) by letter of January 12, 1953, Superintendent Hopkins replied to the said letter of January 10, 1953, declining the grievance claim of appellant (R. 20, 40, 43) as provided in Article 58(c) Item 3 (R. 13); (6) Article 58, Section (c), Item 3, of the agreement provides that where a grievance claim has been declined by the Superintendent, the employee or his representative must within 90 days after the date of said decision give written advice to the Superintendent of his intention to appeal to a higher officer. This section continues: "*If such notice of appeal in writing is not given the Superintendent within the required 90-day limit, the claim will be deemed to have been abandoned.*" (emphasis supplied) (R. 13, 39, 43); (7) no such written notice of appeal was given the Superintendent within the required 90-day period or at any time at all (R. 39, 43-44).

On the basis of the foregoing unchallenged facts appellee's Motion for Summary Judgment was granted. (R. 38-40) Findings of Fact, Conclusions of Law and Judgment in favor of appellee were made and entered by the court (R. 41-46).

A concurrent Motion for Summary Judgment filed by appellant was denied by the court (R. 38). That Motion was based upon the contention that because appellee allegedly dismissed appellant improperly and in violation of agreement provisions relating to investigation, he was excused from complying with the conditions set forth in Article 58 of the agreement (R. 27-28; appellant's brief, pages 46-48). However, Article 58 provides the sole, specific method in which any grievance or claim, whether or not related to alleged wrongful dismissal, must be processed (R. 13, 42-44).

In this state of the case the essential question now before this Court is whether the District Court erred in granting summary judgment on the basis of the record setting forth the above agreed facts. More specifically the questions presented by this appeal are as follows:

1. May an employee maintain an action at law against his employer, for alleged unlawful discharge in violation of a collective agreement, when it affirmatively appears that he has not complied nor attempted to comply with the express provisions of that agreement?

2. When the pertinent provisions of the agreement are clear and unambiguous, and there being no dispute as to any other material fact, did the lower court err in rendering a summary judgment?

3. Must an employee claiming unlawful discharge, in violation of the provisions of a collective bargaining agreement, comply with the procedural steps set forth in that agreement before he may bring either an action in court, or other proceedings of an administrative character, predicated upon his claim?

4. Where the undisputed facts show that appellant and his union representative were capable of filing the

required notice of appeal within the 90-day period and no facts are alleged to the contrary, is appellant excused from compliance with the contractual provisions which are, by their terms, conditions precedent to the bringing of a lawsuit?

5. Is the very discharge which is made the basis of the alleged grievance claim to be considered an excuse for the failure of appellant to handle such claim according to the clear provisions of the agreement?

SUMMARY OF ARGUMENT

A. The District Court did not err in holding that appellant's suit was wholly barred by reason of his failure to comply with the provisions of Article 58(c), Item 3, of the agreement relied on.

The unchallenged facts show that appellant, in undertaking to proceed with his action, failed to comply with the essential conditions precedent to the assertion of the claim and the maintenance of the action.

B. Appellant has not referred to any facts which would excuse him from compliance with the expressed provisions of Article 58. Instead he affirmatively waived any such contention by filing his grievance claim as provided in that article before he abandoned the balance of the requirements.

Under Article 58, Section (c), Item 3, appellant was simply required to file a written notice of appeal with the Superintendent. No reason is shown which would excuse him from filing such notice.

C. Summary judgment is the proper method of disposing of this case where there is no genuine issue as to any material facts.

ARGUMENT

A. The District Court did not err in holding that appellant's suit was wholly barred by reason of his failure to comply with the provisions of Article 58(c), Item 3, of the agreement relied on.

The unchallenged facts show that appellant, in undertaking to proceed with his action, failed to comply with the essential conditions precedent to the assertion of the claim and the maintenance of the action.

As disclosed by the Pre-Trial Order (R. 4-37) and by appellant in his brief (at page 2), this is an action to recover damages for alleged wrongful discharge, claimed to have been in violation of the collective bargaining agreement between appellee and its employees represented by the Brotherhood of Railroad Trainmen.

The facts stipulated in the Pre-Trial Order show beyond any question that (1) appellant was absent from work from August 29, 1952, until the date of his termination on November 24, 1952 (R. 17); (2) on November 6, 1952, appellee directed a letter to appellant, notifying him to appear on November 18, 1952, for investigation in view of the fact that company records indicated his absence from duty without authority commencing August 29, 1952 (the letter addressed to appellant was returned unclaimed) (R. 17); (3) a formal investigation was held as scheduled on November 18, 1952 (an accurate transcript of this investigation was made) (R. 17-18); (4) based upon the evidence developed in the said investigation, on November 24, 1952, plaintiff's service was terminated; he was so advised by United States

registered mail (the letter addressed to appellant was returned unclaimed) (R. 18); (5) on January 10, 1953, Mr. M. S. Felter, Secretary, Local 113, United Railroad Operating Crafts, plaintiff's authorized representative (appellant's brief, p. 10), filed a grievance with Superintendent L. P. Hopkins, seeking reinstatement with seniority unimpaired, and setting forth the facts on the basis of which he contended the company should reverse its position (R. 19-20); (6) by letter of January 12, 1953, Superintendent L. P. Hopkins replied to Mr. M. S. Felter's above letter, declining the said grievance claim (R. 20); (7) thereafter no notice of intention to appeal to a higher officer (referring to the Assistant General Manager of appellee, the highest officer designated to handle grievances on appeal) was given to the Superintendent in writing within 90 days next following the said Superintendent's declination on January 12, 1953, or at all; certain correspondence (R. 20-22) passed between Mr. Felter and Superintendent Hopkins from March 9 to March 19, 1953; this correspondence related to an attempt to arrange a conference; Mr. Felter did not show up at the appointed time; and on March 19, 1953, he wrote: "I wish to thank you for your consideration in trying to arrange an appointment, however, I find there is some more information which must be available before we could discuss the matter further. If this should appear advisable I will again contact you for an appointment." (R. 22); (8) no further correspondence passed between the parties to this action until approximately seven and a half months after January 12, 1953 (R. 2); (9) and although Article 58, Item 3, provides that *unless within 90 days from the date of the Superintendent's declination of the grievance claim (i.e., on January 12, 1953) the employee, or his representative, gives written notification to the Superintendent of his intention to appeal*

to a higher officer "the claim will be deemed to have been abandoned" (R. 13), neither the appellant nor his representative filed such notice within the 90-day period, or at any other time. There was thus a clear failure on the part of appellant to comply with the expressed terms of the contract upon which he relies.

Except where there is a contract limiting its common-law rights, a railroad employer, like any other, may discharge or discipline an employee at will. *Virginian Ry. v. Federation* (1937), 300 U.S. 515, 559; *Texas & N. O. R. Co. v. Ry. Clerks* (1930), 281 U.S. 548; *St. Louis B. & M. Ry. Co. v. Booker* (1928), 5 S.W.2d 856, cert. den. 279 U.S. 852. The Railway Labor Act does not abrogate an employer's right to hire or discharge employees, nor create any right of continued employment. *Texas & N. O. R. Co. v. Ry. Clerks*, *supra*; *Thomas v. New York Chicago & St. Louis R. Co.* (C.A. 6, 1950), 185 F.2d 614. Appellant's rights are, of course, measured by the collective bargaining agreement since his employment cannot be on any other terms. *J. I. Case Co. v. Labor Board* (1944), 321 U.S. 332, 334-336; *Telegraphers v. Ry. Express Agency* (1944), 321 U.S. 342, 346. In this action appellant is bound by all of the terms of the agreement duly entered into by the collective bargaining agent of all of the employees of the craft of trainmen. *Railway Labor Act*, 45 U.S.C., 151 et seq. (particularly Section 152); *Schlenk v. Lehigh Valley R. Co.* (1947), 74 F. Supp. 569, 571; *Elgin & E.R.Co. v. Burley* (1945), 325 U.S. 711, 739; *Elder v. New York Cent. R. Co.* (C.A. 6, 1945), 152 F.2d 361, 364; *Donovan v. Travers* (Mass., 1934), 188 N.E. 705, 707.

The law is well settled in this Circuit, particularly by the controlling decision of this Court in *Barker v. Southern Pac. Co.* (C.A. 9, 1954), 214 F.2d 918, that in these circumstances

appellant has no subsisting cause of action, and that if the essential facts are made to appear without challenge, a motion for summary judgment should be sustained.

In the *Barker* case, the employee had brought suit for damages for alleged wrongful discharge, in violation of the collective bargaining agreement applicable to his employment. Under that agreement a dismissed employee was required to present within ten days after dismissal a written request for a hearing; failing in which, as the agreement rule said, "the cause for action shall be deemed to have been abandoned". Summary judgment was rendered upon defendant's motion, and an undisputed showing that timely request for a hearing had not been made. Upon the employee's appeal, this Court said (214 F.2d, p. 919):

"* * * The conditions required to be performed by appellant before he could claim breach by the other party were not fulfilled. Only if the company failed to accord to appellant the hearings provided after notice or by arbitrary disposal of his claim would there have been a breach of contract. *The exhaustion of the steps set out in the contract were a condition precedent to his cause of action.*" (Emphasis supplied.)

This same Article 58, Section (c), of the Trainmen's Agreement has been construed and applied by two United States District Courts in this Circuit. In *Wallace v. Southern Pac. Co.* (U.S.D.C., N.D. Cal. S.D., 1951), 106 F. Supp. 742, the Court referred to Article 58(c) of the agreement, and the interpretation thereof, and the failure of the employee plaintiff to comply with the requirements stated therein. In Conclusion of Law No. 4 the Court said (106 F. Supp., p. 745):

"Compliance by plaintiff with the provisions of Article 58 (as modified by the Agreed-to Interpretation) of

the applicable collective bargaining agreement was a condition precedent to the assertion by him of any claim or grievance arising from his dismissal on January 23, 1946, or from the proceedings leading thereto. Plaintiff having failed to comply with such provisions is barred from asserting any such grievance, i.e., claim that he was discharged in violation of the terms of the collective bargaining agreement; and any and all rights or claims which he may have had as a result of such dismissal expired and ceased to exist when he failed to comply with such provisions. Plaintiff's grievance was not presented within the time therein provided."

Another case, involving again Article 58 of the same agreement, was *Willman v. Southern Pac. Co.* (1948), U.S.D.C., N.D.Cal. N.D., No. 5937. In that case the Court, speaking through Judge Lemmon (now a member of this Court), rendered judgment for defendant, and adopted the following as its third conclusion of law:

"3. Compliance by plaintiff with the provisions of Article 58 (as modified by the Agreed-to Interpretation) of the applicable collective bargaining agreement was a condition precedent to the assertion by him of any rights arising from his dismissal on June 21, 1946, or from the proceedings leading thereto. Plaintiff having failed to comply with such provisions is barred from asserting any grievance, i.e., claim that he was discharged in violation of the terms of the collective bargaining agreement, and any and all rights which he may have had as a result of such dismissal expired and ceased to exist when he failed to comply with such provisions. That plaintiff's grievance was not presented within the time therein provided."

It will be noted that the Court's conclusion in the later *Wallace* case was practically identical with the corresponding conclusion in the *Willman* case.

This failure to comply with agreement provisions was held to bar any recovery by a dismissed employee who had failed to present a grievance claim as required by the terms of the agreement by the United States Supreme Court in *Transcontinental Air v. Koppal*, 345 U.S. 653 (1953). The Court held at page 657 as follows:

“Appellant in terms sues because of an alleged breach of this contract, and, to prevail, he must show that he has brought himself within its terms and has been unable to secure a satisfactory adjustment by the means therein expressly provided. *This he has failed to do, and for this reason he is unable to present his case in court as a justiciable controversy.*” (Emphasis supplied.)

Summary judgments in favor of appellee Southern Pacific Company have recently been rendered by the courts in the following cases involving the failure of dismissed employees to comply with substantially the same provisions as those which we are considering in collective bargaining agreements relative to other crafts of employees.

Buberl v. Southern Pac. Co. (U.S.D.C., N.D. Cal. SD-1950), 94 F. Supp. 11;

[Failure to present written grievance concerning dismissal within the time limit provided in the Yardmen's agreement]

Lawrey v. Southern Pac. Co., U.S.D.C., Dist. of Oregon, Civ. No. 6451 (1953);

[Failure to file grievance in writing challenging dismissal within the time limit provided in agreement with Railway Patrolmen]

Poe v. Southern Pac. Co., U.S.D.C., Nevada No. 1105 (1955);

[Failure to file grievance in writing challenging dismissal within the time limit provided in agreement with Locomotive Engineers]

Barton v. Southern Pac. Co., U.S.D.C., Dist. of Oregon, Civ. No. 6693 (1954) ;

[Failure to file grievance in writing concerning dismissal within the time limit provided in agreement with Mechanical Crafts]

Candia v. Southern Pac. Co., Dist. Court of the State of Utah, Second Jud. Dist., in and for the County of Weber, Case No. 28,203, Dept. No. 2 (1954) ;

[Failure to file grievance in writing challenging dismissal within the time limit provided in agreement with Mechanical Crafts]

In *Buberl v. Southern Pac. Co.*, *supra*, defendant's Motion for Summary Judgment was granted for two reasons, one of which was stated by the Court as follows (94 F.Supp., p. 12) :

"Judgment must also be for the defendant for another reason. The collective bargaining agreement, and the agreed interpretations thereof, which governed plaintiff's employment, *require employees who are dissatisfied with the decision of their Superintendent on any claim respecting employment to notify him of their intention to appeal to the General Manager or his representative.* This plaintiff failed to do." (Emphasis supplied.)

In the *Lawrey* case, the District Court for Oregon said :

"Plaintiff may not assert any rights under the contract between defendant and the Railway Patrolmen's Union when plaintiff has not complied with the time

limitation set forth in the grievance procedure of the contract.”

In the *Poe* case, the District Court for Nevada entered summary judgment for the defendant, making findings as follows:

“7. No grievance or claim asserting that plaintiff’s dismissal was improper, or in violation of the agreement aforesaid, or that plaintiff was not at fault in respect to said violations of rules and instructions, was filed by plaintiff in writing within the sixty days next following December 17, 1951, or at any other time, at all, as required by Article 25, Section 4(a) of the applicable agreement. Specific compliance with the successive steps set out in the agreement is an essential condition precedent to the prosecution of plaintiff’s cause of action.

* * * * *

10. Plaintiff failed to institute any proceedings at all before the National Railroad Adjustment Board relating to or including the claim of agreement violation upon which this action is predicated. Plaintiff likewise failed to institute any action or proceeding based upon said claim of agreement violation, in any court or tribunal having jurisdiction, within six months next following either December 17, 1951, or December 5, 1952, or February 10, 1953, or at all until the filing of this action on August 25, 1953. Said claim, or any action based thereon, is and are wholly barred by virtue of the provisions of Article 25, Section 4(c) of said agreement.”

Numerous other decisions on all fours with the instant case have been rendered by the courts holding that the causes of action were barred because of the failure of plaintiffs to comply with the expressed requirements of collective bargaining agreements.

- Atlantic Coast Line R. Co. v. Pope* (C.C.A. 4, 1941), 119 F.2d 39;
- Davis v. Union Pacific R.R. Co.* (U.S.D.C. Dist. of Nebraska, Omaha Div., Civ. No. 86-50-1952, 21 CCH Labor Cases, parag. 66,834) ;
- Taylor v. Southern Pac. Co.* (U.S.D.C. N.D. Cal. SD-1955, No. 31812 Civ.) ;
- Duminie v. Southern Pac. Co.* (U.S.D.C. N.D. Cal. SD-1953, No. 30483-Civ.) ;
- United R.R. Workers v. A. T. & S. F. Ry.* (U.S.D.C. Ill.-1950), 89 F. Supp. 666;
- Youmans v. Charleston & W. C. Ry. Co.* (1935), 175 S. Car. 99, 178 S.E. 671;
- McGlohn v. Gulf & S. I. R.R.* (1937), 179 Miss. 396, 174 So. 250;
- Division of Labor Law Enforcement, Dept. of Industrial Relations, State of California v. P.E. Ry. Co.* (1952), Superior Court of California, Appellate Dept., L.A. County, No. Civ. A-7962; 22 C.C.H. Lab. Cases, Parag. 67,244;
- Crow v. Southern Ry. Co.* (1942), 66 G.A. 608, 18 S.E. 2d 690;
- Hornsby v. Southern Ry. Co.* (1944), 70 Ga. A. 467, 28 S.E. 2d 542.

Appellant contends at page 20 of his brief that under Oregon law appellant was not required to exhaust the procedures provided in Article 58 of the agreement. He asserts that there is no Oregon decision on the issue in question and attempts to distinguish *Beck v. General Insurance Company* (1933), 141 Ore. 446, 18 P.2d 579 on the ground that it involved an enforceable time limitation in an insurance contract instead of a collective bargaining agreement. He also

asserts that the condition was one of a different character than that in Article 58, which is assertedly not made a condition to maintaining a civil action and in any event is an "arrangement for arbitration" which was unenforceable under Oregon law.

We submit that the Oregon law specifically requires a party seeking to recover upon a contract to show that he has complied with the conditions required of him to be performed. Thus contractual terms such as Article 58, Section (c), have been upheld restricting the time and manner in which one can enforce his rights under the contract in the absence of any proof that the provisions are arbitrary and unreasonable. *Beck v. General Insurance Company, supra*; *Egan v. Oakland Insurance Company* (1895), 290 Ore. 403, 42 Pac. 990; *Ausplund v. Aetna Indemnity Co.* (1905), 47 Ore. 10, 81 Pac. 577, 82 Pac. 12. In the *Ausplund* case the Court said in 81 Pac. 577, at page 581:

"The parties to a contract may stipulate that an action for breach of an agreement must be brought within a certain period, and, if such limitation is reasonable, it will be upheld."

On the facts of this case the provisions of Article 58 are not unreasonable, and appellant does not contend otherwise. Furthermore, the Oregon law has been thus interpreted and applied by the United States District Court in two decisions to which we have already referred. In *Lawrey v. Southern Pac. Co.*, (U.S.D.C., Dist. of Ore., Civ. No. 6451-Jan. 24, 1953), and *Barton v. Southern Pac. Co.*, (U.S.D.C., Dist. of Ore., Civil No. 6693-Feb. 9, 1954), the Court granted summary judgments in favor of the defendants on the basis that the plaintiffs had failed to exhaust the grievance procedure and time limitations contained in the agreements between

Southern Pacific Company and its Railway Patrolmen and System Federation No. 114, respectively (R. 38-40).

Nor is there merit to appellant's suggestion that Article 58 does not create a condition to the maintenance of a civil action, intimating that these conditions apply solely to any recourse to the National Railroad Adjustment Board. Article 57 is entitled "Discipline-Investigations" and its contents refer to disciplinary action, including dismissal. Article 58, "Limitation in Presenting Grievances", provides a specific detailed procedure for the presentation and handling of grievances arising out of any alleged failure of appellee to comply with Article 57. Article 58, Section (c), Item 4, states: "*The above time limitations embodied in Items 2 and 3 shall also apply to disciplinary cases.*" (Emphasis supplied.) Referring to the undisputed factual situation in this case (i.e., failure of appellant to advise the Superintendent in writing of his intention to appeal to higher officer from the Superintendent's declination of his grievance claim on January 12, 1953): "*If such notice of appeal in writing is not given the Superintendent within the required 90-day limit, the claim will be deemed to have been abandoned.*" (Emphasis supplied.) These provisions unequivocally set forth conditions precedent to any claim by an employee that he was improperly dismissed. A.L.I. Restatement of the Law of Contracts, Sec. 259, Illus. 1. The question of construction of all written instruments is for the court. *Hamilton v. Liverpool, London & Globe Ins. Co.* (1890), 136 U.S. 242, 255; *Hughes v. Dundee Mtg. Co.* (1891), 140 U.S. 98, 104; *Insurance Co. v. Glidden* (1931), 284 U.S. 151, 157; *IX Wigmore on Evidence* (3rd Ed.) 552, parag. 2556; A.L.I. Restatement of the Law of Contracts, Sec. 235(e). The District Court in this case correctly construed the agreement according to its expressed terms (R.

38-40). The conditions set forth in Article 58 are substantially the same as those in *Transcontinental & Western Air v. Koppal* (1953), 345 U.S. 653, where the Supreme Court said at page 659:

“It included provisions that no employee in respondent’s status shall be discharged—

‘without a fair hearing before a designated representative of the Company other than the one bringing complaint against the employee * * * At a reasonable time prior to the hearing, such employee and his duly authorized representative will be apprised, in writing, of the precise charge and given a reasonable opportunity to secure the presence of necessary witnesses. * * * A written decision will be issued within five (5) work days after the close of such hearing. If the decision is not satisfactory, then appeal may be made in accordance with the procedure prescribed in Step 3.’

Step 3 provided for an appeal to the chief operating officer of the company. *Notice of intent to appeal must be in writing and made within ten work days after the above-mentioned decision which is part of Step 2.* If the decision in Step 3 is not satisfactory to the union, the matter then may be referred by the system general chairman, acting for the union, to the system board of adjustment, or, by mutual agreement, to arbitration.” (Emphasis supplied.)

The conditions referred to above are also like those in the cases involving collective bargaining agreements which we have cited heretofore, and particularly the *Barker* case, *supra*, in which this Court said at page 919 (214 F.2d 919): “The conditions required to be performed by appellant before he could claim breach by the other party were not fulfilled * * *. The exhaustion of the steps set out in the contract were a condition precedent to his cause of action.”

The *Barker* case likewise held at page 919 with regard to such grievance procedure: "It is our view that the filing of a request (under the contract) for a hearing, is intended to be a condition precedent to both procedures above referred to." (Application either to the National Railroad Adjustment Board or to the courts.) This view is clearly in accord with the holding in the *Koppal* case, *supra*. Finally, the difference between the procedure relating to the handling of grievance claims and arbitration is self-evident. The latter contemplates an agreement to submit a matter to the judgment of a designated third party or neutral for final determination. 6 Williston, Contracts (Rev. Ed. 1938), par. 1918. Arbitration has been criticized in some states as ousting the courts of their jurisdiction and restricting the parties from enforcing their rights under the contract by the usual legal proceedings in the ordinary tribunals. See *Rueda v. Union Pac. R. Co.* (1946), 180 Ore. 133, 175 P.2d 778. The contractual grievance procedure, in this case is simply a condition precedent to any recovery upon this contract, whether in proceedings which may ultimately be brought by the parties before the National Railroad Adjustment Board or in court. The required procedure is in no way similar to arbitration.

Appellant cites certain decisions which are said to hold that a discharged railroad employee may sue for damages for breach of his employment contract without having exhausted the grievance procedures provided therein. We have already referred to the recent Supreme Court decision in *Transcontinental & Western Air v. Koppal*, 345 U.S. 653 (1953), and *Barker v. Southern Pac. Co.* (1954), 214 F.2d 918, which hold that the administrative remedies in a railroad collective bargaining agreement must be exhausted before a dismissed employee may bring a justiciable claim

in court. The *Koppal* case affirmed the order of the District Court dismissing the complaint, while the *Barker* case affirmed a summary judgment in favor of the carrier-appellee and indicated that the question of exhaustion of administrative remedies may not be involved where the contractual condition precedent is unequivocally set forth. The contract in the *Barker* case provided in part, “* * * , otherwise the right to a hearing shall cease and the cause for action shall be deemed to have been abandoned.” (214 F.2d 919). Similarly the contract in the case at bar reads, “If such notice of appeal in writing is not given the Superintendent within the required 90-day limit, the claim will be deemed to have been abandoned.” (R. 13). By way of comparison it is interesting to note that the language in the agreement which the Supreme Court held to be a mandatory administrative procedure in the *Koppal* case, *supra*, reads, “If the decision is not satisfactory, then appeal *may be made* in accordance with the procedure prescribed in Step 3.” (Emphasis supplied.) (345 U.S. 659) This language, which also appears in the opinion of the Court of Appeals (199 F.2d 122), was interpreted by the court as being conditional to the assertion of a justiciable claim in court. It was recognized that only after the employee had complied with these requirements could he effectively elect to assert a claim against the carrier for wrongful discharge (i.e., claim that he had been discharged in violation or breach of some provision of the contract), either seeking the remedy of reinstatement and pay for time lost before the National Railroad Adjustment Board or disavowing his employment relationship and seeking to recover damages in court for the same alleged breach of contract. Clearly the distinction in available remedies does not import a distinction in the

creation, limitation or accrual of the right upon which they are based. *Barker v. Southern Pac. Co.*, supra.

The cases cited by appellant at pages 32 and 33 of his brief are not applicable to the instant case. As pointed out in the *Koppal* case, supra (345 U.S. at page 661), the courts of Texas and Mississippi do not appear to apply the doctrine of exhaustion of administrative remedies which, as we have shown heretofore, is the generally applied rule. Nor do the decisions of those courts reach the question of expressed contractual conditions which are discussed in the *Barker* case, supra, and which are present in the instant case. Thus *Dufour v. Continental Southern Lines, Inc.* (Miss. 1953), 68 So.2d 489, and *Thompson, Trustee, St. Louis, Brownsville & Mexico Ry. Co. v. Moore* (C.A. 5, 1955), 223 F.2d 91, are not applicable here. The other cases cited by appellant were all decided prior to the Supreme Court's decision in the *Koppal* case (July 1, 1953). *Condol v. B. & O. R. Co.* (C.A.-D.C., 1952), 199 F.2d 400, and *Gould v. L. & O. R. Co.*, 203 F.2d 238 (C.A. 5, 1953), were decided solely on the point that each action was barred by the applicable statute of limitations.

B. Appellant has not referred to any facts which would excuse him from compliance with the expressed provisions of Article 58. Instead, he affirmatively waived any such contention by filing his grievance claim as provided in that article before he abandoned the balance of the requirements.

Under Article 58, Section (c), Item 3, appellant was simply required to file a written notice of appeal with the superintendent. No reason is shown which would excuse him from filing such notice.

The same provisions of Article 58, Section (c), of the agreement here involved (which governs the employment of

trainmen by appellee throughout its system) have been construed by the courts as conditions precedent to the assertion of any claim for wrongful discharge based upon the agreement. *Wallace v. Southern Pac. Company* and *Willman v. Southern Pac. Company*, both *supra*. Appellant asserts that he returned from his absence and reported for work on or about December 1, 1952 (R. 32), and learned that he had been removed from service (appellant's brief, page 8). Thereafter, as provided in Article 58, Section (c), Item 2, acting through his union representative, on January 10, 1953, he filed a written grievance claim with Superintendent L. P. Hopkins (R. 19, 40, 43). By letter of January 12, 1953, to appellant's representative, Superintendent Hopkins declined the said grievance claim (R. 20, 40, 43). At no time following this declination by the Superintendent did appellant carry out the next successive requirement of Article 58, Section (c), Item 3, that he must advise the Superintendent in writing of his intention to appeal to a higher officer. The agreement states that such failure shall result in abandonment of the claim (R. 13).

The specific provision in Article 58 which provides successive steps for handling of a grievance or claim (i.e., the contention that the agreement was improperly applied with respect to the employee), including the time limitation within which appeal to a higher company officer must be made, has two important purposes: (1) that the higher company officer should be given the opportunity to review the matter and correct any errors which may have been made at a lower level; and (2) to protect the parties to the agreement from the assertion of stale and vexatious grievances and claims.

Appellant's brief, at pp. 36, et seq., makes the contention that he did not receive notice of investigation, which was held on November 18, 1952, or of his dismissal within thirty

days after November 24, 1952, its effective date. This is said to constitute a breach of contract on the part of appellee and an excuse for the failure of appellant to follow the terms of Article 58. It is thus contended, on the one hand, that appellee breached the contract by failure to follow its terms in notifying, investigating and dismissing appellant, but, on the other hand, that the agreed means of reviewing and rectifying such erroneous action is not applicable. Clearly such a proposition is not consonant with a reasonable interpretation of the agreement. It is important to note that appellant has pointed to no fact of any nature which would excuse him from simply writing a letter to the Superintendent or notifying him of his intention to appeal if he was in fact dissatisfied with the Superintendent's action. Instead, appellant admits that as early as December 1, 1952, he appeared at appellee's office at Roseburg, Oregon, and was personally advised that he had been removed from service (R. 32). Thereafter, through Mr. M. S. Felter, his union representative (appellant's brief, p. 10), he recognized the applicability of the steps provided in Article 58 when he presented his alleged grievance claim relating to his dismissal to Superintendent L. P. Hopkins within the prescribed 90-day period (R. 13, 19). The said letter of January 10, 1953 (R. 19) was accepted by appellee as a presentation of appellant's grievance, as required by Article 58, Section (c) (R. 40). Appellant cannot avoid the fact that he thereby waived any excuse for not filing or further handling his alleged grievance claim. The fact that his claim was declined by Superintendent Hopkins on January 12, 1953, (R. 20) does not, of course, entitle appellant to brand the remaining steps of Article 58 either as "excused", "useless" or "futile". (Appellant's brief, page 42-44). As he himself says at page 43: "The most that can be said for use of the procedure is

that it would have given appellee, through its higher officials, the opportunity to correct any mistake made by the trainmaster." As we have stated heretofore, this is one of the important purposes of Article 58 of the contract. At page 44 appellant continues: "As it was, he was entirely justified in abandoning further the pursuit of a futile and useless appeal." It would appear that without basis in fact appellant would insist upon the benefits of the collective bargaining agreement and at the same time disavow its obligations.

Unless appellant relies upon Mr. Felter's letter of January 10, 1953, his claim would have been barred in the first instance by reason of his omission to comply with Article 58. *It is significant that Mr. Felter's said letter of January 10, 1953, (R. 19-20) does not assert or refer to any alleged defect on the part of appellee in either notifying, investigating or otherwise handling the dismissal of appellant.* No grievance was ever filed challenging the said action as being in any way inconsistent with the provisions of Article 57 until June 22, 1954, when the instant complaint was filed. Clearly any such contention on the part of appellant cannot, consistent with the provisions in the agreement upon which he relies or with the doctrine of laches, be made more than a year and a half following the date of such dismissal. Nor can such a contention be considered as an excuse on behalf of appellant for his complete failure to bring it to the attention of the specified officers of appellee in accordance with the administrative procedure set forth in Article 58. The agreement specifically provides that any such contention is deemed to have been abandoned.

In most of the cases which have been cited, the claim of alleged wrongful dismissal was coupled with a claim that the carrier had failed to accord a proper hearing or investigation under the agreement. Such claims include "failure

to permit the employee to have a representative of his own choice" (*Lawrey v. S. P. Co.*, supra) and "failure to give proper written notice or to confront the employee with the evidence against him" (*Wallace v. S. P. Co.*, and *Poe v. S. P. Co.*, both supra, *Transcontinental & Western Air v. Koppal*, 199 F.2d 117, 120-121, reversed and ordered dismissed in 345 U.S. 653, and the case at bar). Recent cases which have considered this matter uniformly hold that since any right to a hearing or investigation arises solely out of the agreement (and not out of statute), the existing contract controls. *Butler v. Thompson*, (C.A. 8, 1951), 192 F.2d 831; *Broadly v. Illinois Central R. Co.* (C.A. 7, 1951), 191 F.2d 73, 76; *Brooks v. Chicago R.I. & P.R. Co.* (C.C.A. 8, 1949), 177 F.2d 385, 391. The Court of Appeals in *Butler v. Thompson* said, at page 833:

"The statute recognizes a distinction between proceedings on the company level and those before the Adjustment Board when there is in effect a collective bargaining contract. In investigations, conferences or hearings by or before officers of the carrier an existing legal contract controls, whereas the procedure before the Board is controlled by the statute. In *Brooks v. Chicago, R.I. & P.R. Co.*, 8 Cir., 177 F.2d 385, 391, this court after careful consideration said: 'The Railway Labor Act does not empower the courts to enforce against railroads any prescribed procedure for investigating and discharging its employees, * * *.' "

Obviously appellant, if he is to sustain a charge that the notice of investigation or the other investigation procedure was insufficient and constituted a breach of contract by appellee, he must show that he has presented these questions to his superiors as required by Article 58. Since he admittedly has not done this, the claim "is deemed to have been abandoned".

Appellant cites certain awards of the National Railroad Adjustment Board which are said to hold that where an employee has been disciplined without proper investigation he is relieved from compliance with the grievance procedure. No reference is made to the parties, the dates of the awards or the provisions of the contracts to which they refer. They clearly antedate the court decisions which we have cited hereinbefore. In its Decision No. 1499, dated March 21, 1955, Special Adjustment Board No. 18 (Train and Yard Service Panel), a board duly constituted under the terms of the Railway Labor Act to hear disputes on the property of appellee, affirmed the carrier's action in dismissing an employee for being absent without proper authority. A registered letter was addressed to the claimant at his last known address, which was returned with the notation "moved—left no address." The investigation upon which the dismissal was predicated was held in the absence of the claimant.

Appellant also cites *New Orleans Public Belt R. Com'n. v. Ward*, 195 F.2d 829 (C.A. 5, 1952), as holding that the employee involved must have been afforded an investigation in facts allegedly like those involved here. To the contrary, the *Ward* case held that Mrs. Ward had in fact appealed within the 30-day period specified in the supplemental agreement (page 831); and that in fact she had appealed to the management within the two-day period prescribed in Section VI, Rule 1(a), although the latter section was not applicable to her status as a laid-off (rather than dismissed) employee. It is self-evident that the question of exhaustion of administrative remedies under the contract was not involved, although the court expressly recognizes that it would have been enforced.

In *Barker v. Southern Pac. Co.*, 214 F.2d 918 (C.A. 9, 1954) plaintiff failed to ask for the hearing provided in Section 25(a) of the applicable agreement, contending that it was not necessary prior to recourse to the courts. The Court of Appeals for the Ninth Circuit affirmed the ruling of Judge Louis E. Goodman granting summary judgment in favor of defendant. Appellant attempts to distinguish the *Barker* case by saying that the agreement did not require a hearing before discharge. While a discharge under that agreement does occur before hearing, this point does not distinguish the case because under Rule 25 of the Dining Car Cooks and Waiters Agreement a timely request for a hearing in effect suspends the discharge and entitles the employee to a review by higher company officials. Appellant's brief (at page 35) cites a portion of the appellate court's opinion out of context. However, the inference attempted to be drawn therefrom is not accurate. Reference to page 919 of the opinion will show that the court was considering the fact that the contract was terminable for any cause satisfactory to appellee. In light of this, the court declared that the "failure to give notice in ten days did not cut off or destroy any existing right of action * * *" Then the court pointed out the only possible limitations on the right of the company to dismiss, i.e., failure to give notice, accord a hearing upon timely request or arbitrary disposal of Barker's claim, any of which would be considered a breach of contract on the part of the appellee. In respect to any such breach of contract the court said at page 919:

"The conditions required to be performed by appellant before he could claim breach by the other party were not fulfilled. (Emphasis supplied.)

* * * * *

“The exhaustion of the steps set out in the contract were a condition precedent to his cause of action.”

Further the court said at page 920 that in the contract involved “* * * the request for a hearing has been made a condition precedent to the bringing of a law suit. *Wallace v. Southern Pac. Co.*, 106 F. Supp. 742 * * *” Reference to the provisions of the agreement there under consideration (page 919) shows that the same language was used in that contract as in the case at bar. There the contractual condition stated “otherwise the right to a hearing shall cease *and the cause for action shall be deemed to have been abandoned*”. (Emphasis supplied.) In the case at bar the condition reads: “If such notice of appeal in writing is not given the Superintendent within the required 90-day limit, *the claim will be deemed to have been abandoned* * * *” (Emphasis supplied.) (R. 13)

As noted above, the Court of Appeals cited *Wallace v. Southern Pac. Co.*, *supra*, also decided by Judge Goodman, which involved the identical Article 58(c) of the Trainmen’s Agreement with which we are here concerned. There judgment was rendered in favor of defendant in a case on all fours with the instant case. Reference to the complaint in the *Wallace* case discloses that he alleged (pages 4 and 5):

“VI

“That the aforesaid discharge of plaintiff by defendant was unjust and in contravention of the aforesaid written contract of defendant and The Brotherhood of Railroad Trainmen in that:

“1. Plaintiff did not receive written notice of the formal investigation by defendant as to specific charge, time and place, sufficiently in advance to afford him the opportunity to arrange representation and for the attendance of desired witnesses.

"2. Plaintiff was not confronted with the evidence against him as required by the contract of employment.

"3. Plaintiff was not available for said investigation on account of sickness and injury, and that defendant had knowledge of said sickness and injury of plaintiff at the time it called said investigation."

In these respects the defendant was alleged to have violated Article 57 of the Trainmen's Agreement. It was contended throughout the trial that defendant had breached the contract and the plaintiff was excused from presenting a grievance as provided in Article 58. The Court said (106 F. Supp. 742, at page 75):

"Plaintiff having failed to comply with such provisions is barred from asserting any such grievance, i.e., claim that he was discharged in violation of the terms of the collective bargaining agreement; and any and all rights or claims which he may have had as a result of such dismissal expired and ceased to exist when he failed to comply with such provisions. Plaintiff's grievance was not presented within the time therein provided."

Neither the *Wallace* nor *Willman* cases, *supra*, can be distinguished from the instant case in this rationale in the application and interpretation of this agreement.

In *Transcontinental & Western Air v. Koppal*, *supra*, the Supreme Court, reversing the decision of the Court of Appeals in 199 F.2d 117, held that in an action for wrongful discharge predicated upon a collective bargaining agreement, the employee must show compliance with the terms of that agreement. The court accordingly held that since the law of Missouri required an employee to exhaust the administrative remedies under his employment contract, in order to sustain his cause of action, and it appeared that he had failed to do so, the judgment of the District Court

dismissing his complaint must be affirmed. Specifically, the Court said (345 U.S., p. 662):

“* * * Here respondent [the employee] was employed by a carrier subject to * * * the Railway Labor Act, and his employment contract contained many administrative steps for his relief, all of which were consistent with that Act. Accordingly, while he was free to resort to the courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do so and his complaint was properly dismissed.”

In the *Koppal* case, as here, the employee claimed that he was dismissed “‘without a fair hearing’ as expressly provided for in the agreement.” In the opinion of the Court of Appeals, 199 F.2d 117, 120-121, the following appears:

“Evidence is contained in the record from which it properly could be found as a fact that no other notice was given plaintiff of the hearing except the oral statement of the manager, after his interview with the two employees, fixing the second day following for an airing of the matter; that the hearing was set for the manager’s office and no intention was expressed to have it held by some other officer—another officer being required under the contract only in relation to a discharge proceeding; that no suggestion was made to plaintiff that his job might be in jeopardy or that it would be advisable for him to have any witnesses present who could corroborate his story as to his illness; that the impression which plaintiff received from all the circumstances was simply that the session was to constitute a fuller airing of the situation, or, as he termed it, ‘a scare session;’ that he thus did not undertake to get the union or anyone else to represent him or to have witnesses present who, he claimed, could have substantiated the fact that he actually was ill and had not lied

about the reason for his absence; that, while a representative of the union appeared at the hearing, he did not attempt to confer with plaintiff or to advise him or intercede for him or to bring out his years of job service and previous record of satisfactory relationship; that the union representative's only interest throughout the course of the hearing seemed to be in the problem of absenteeism as it related to union members—of which plaintiff was not one—and the union's attempt to deal with it among its members; and that plaintiff had not realized, either before or through the hearing, that the matter of his discharge was being considered and thus was caught unawares when the hearing officer announced at the close of the hearing that he was persuaded from the evidence presented that plaintiff had been guilty of dishonest abuse of the sick-leave privileges and that he felt that plaintiff should be discharged."

The Court of Appeals reversed the action of the District Court in dismissing the complaint and taking away from the jury the questions of the adequacy of the hearing and correctness of the discharge. The Supreme Court thereafter reversed the judgment of the Court of Appeals and affirmed the action taken by the District Court, saying at page 662 (345 U.S. 662):

"Accordingly, while he was free to resort to the courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do so and his complaint was properly dismissed."

C. Summary judgment is the proper method of disposing of this case where there is no genuine issue as to any material facts.

As shown herein, the stipulated facts set forth in the Pre-Trial Order (R. 4-37) disclose that appellant filed a

grievance claim challenging his dismissal as being a breach of contract and thereafter failed to comply with the successive steps required of him by the agreement.

This case is similar to *Gifford v. Travelers Protective Ass'n.*, 153 F.2d 209 (C.A. 9, 1946), and *Barker v. Southern Pac. Company*, 214 F.2d 918 (C.A. 9, 1954), which affirmed summary judgments under Rule 56(c) of the Federal Rules of Civil Procedure; also the *Buberl*, *Lawrey*, *Poe*, *Barton* and *Candia* cases, *supra*, all of which were decided on Motions for Summary Judgment, and *Transcontinental & Western Air v. Koppal*, 345 U.S. 653 (1953), where the court affirmed the dismissal of the case for lack of justiciability in facts parallel to those at bar.

CONCLUSION

Article 58, Section (c), Item 3, of the collective bargaining contract upon which this action is predicated clearly places a condition upon the right of a discharged employee to make any further claim.

Having ignored the expressed terms of the agreement, appellant cannot avoid the agreed consequences that any further claim thereunder is abandoned and extinguished.

No genuine dispute exists as to any fact material to the disposition of this case. The judgment should be affirmed.

Respectfully submitted,

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Dated at San Francisco, November 8, 1955.

No. 14,799

In the

United States Court of Appeals For the Ninth Circuit

GEORGE PEOPLES, *Appellant*,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee.

APPELLANT'S REPLY BRIEF

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Appellee asserts that the District Court did not err in holding appellant's suit was barred by reason of his failure to comply with Article 58 (c) of the collective bargaining agreement.

REPLY TO APPELLEE'S PROPOSITION "B"	13
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Appellee contends that there are no facts which would excuse appellant from compliance with the provisions of Article 58.

Appellee contends that appellant has waived his right to contend that he was excused from compliance with Article 58.

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No. 14,799

In the

United States Court of Appeals For the Ninth Circuit

GEORGE PEOPLES, *Appellant*,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee.

APPELLANT'S REPLY BRIEF

PRELIMINARY ANALYSIS

Appellee's brief joins issue with appellant's brief on three of the specifications of error stated in that brief, those numbered I, II and III. Appellee's proposition "A" is directed to Specification of Error No. I, proposition "B" to No. II, and proposition "C" is apparently intended as an answer to Specification of Error No. III. Actually, this proposition depends upon propositions "A" and "B." For this reason no reply will be made to it separately.

Throughout the brief the assumption is made and constantly restated that the collective bargaining agreement under which appellant was employed expressly required that appellant use the procedure provided in

Article 58 (c) of the agreement before he could maintain this action for damages. In making this assumption appellee assumes one of the issues. While appellee's brief does on pages 15 and 16 address itself to this issue, the brief by and large is framed on the theory that this premise of their argument is conceded.

REPLY TO APPELLEE'S PROPOSITION "A"

Appellee asserts that the District Court did not err in holding appellant's suit was barred by reason of his failure to comply with Article 58 (c) of the collective bargaining agreement since the unchallenged facts show that appellant failed to comply with "essential conditions precedent to the assertion of the claim and the maintenance of the action." (Brief for Appellee, p. 5).

We will analyze this proposition in the order in which it is presented in appellee's brief, pp. 5-19.

1. Appellee first contends that in the absence of a contract limiting common law rights a railroad employer has the right to terminate an employee at will and this right is not changed by the NRLA. (Br. Appellee, p. 7).

2. It is then asserted that appellant's rights are measured by the terms of the collective bargaining agreement and appellant is bound by the agreement.

We agree in substance with both of the above statements. Appellant had an individual contract of employ-

ment with appellee which, in effect, embodied the terms of the collective bargaining agreement.

The District Court made no finding or conclusion on this point so the judgment in the lower court was not based on any holding that appellee had the right to discharge the appellant at will. Rather, it seems to have been assumed by the court that Article 57 (b-k) did limit the right of discharge but that no cause of action existed because of failure to comply with Article 58.

3. Appellee next argues that the law is well settled in this Circuit that under the circumstances of this case appellant has no subsisting cause of action. Appellee cites the case of *Barker v. Southern Pacific Company*, 214 F. (2d) 918 as a controlling decision which is allegedly unfavorable to appellant's position. Appellee also cites *Wallace v. Southern Pacific Company*, 106 F. Supp. 742 (U.S. D.C., N. D. Cal., 1951), *Buberl v. Southern Pacific Company*, 94 F. Supp. 11, and five unreported cases, two in the United States District Court for Oregon, one in the Northern District of California, one in the District of Nevada and one in a state trial court in Utah.

The law of other states in the Circuit is not controlling. The law of Oregon governs the construction of the contract of employment. (Br. Appellant, p. 19). Decisions in other jurisdictions, of course, may be relevant in attempting to arrive at a determination of what the Oregon law is or should be.

We have discussed the *Barker* case in our original brief. It is discussed by appellee with quite different results on pages 7-8 of Brief for Appellee. Opposing counsel fail to note that in the *Barker* case the terms of the contract were quite different. There Rule 25 (2) provided what we may call the "dismissal procedure" and permitted the employer to discharge the employee without investigation. The employee might then make a written request for a hearing. Rule 25 (i) contained provisions for the "further handling" of a grievance. For convenience we call this the "grievance procedure." The use of the "grievance procedure" was not directly held to be a condition to proceedings in court. The court, after describing Rule 25 (i), stated that Rule 25 might embrace both administrative procedure and possible recourse to the courts, but that the request for hearing was intended to be a condition to both procedures.

The case of *Wallace v. Southern Pacific Company*, 106 F. Supp. 642, also arose in California. The decision in the case does not disclose what the plaintiff's contentions were or whether he urged upon the court the contract interpretation advanced by appellant here.

The comments made above on the *Wallace* case also apply to another case arising under California law which is cited by appellee, *Buberl v. Southern Pacific Co.*, 94 F. Supp. 11. Further in the *Buberl* case the complaint was

based on the alleged breach by the employer of Article 57 (f) of the collective bargaining agreement, namely a provision for *reinstatement* with back pay where the discharge is found to be unjust, and not on the failure to accord plaintiff a proper investigation.

4. Appellee next cites a number of cases which, it is said, held that causes of action were barred because of the failure of plaintiff to comply with the expressed requirements of collective bargaining agreements. (Br. Appellee, p. 18).

Of these cases two are unreported cases in the United States District Court for the Northern District of California. Of the remainder, only two appear to be directly relevant to the issues of this case.

Atlantic Coast Line R. R. Co. v. Pope, 119 F. (2d) 39 (CCA-4; 1941) was an action by a discharged employee to enforce an award of the NRAB providing for his reinstatement by the defendant.

The case has no direct bearing on the present case. It was concerned with a dispute under the RLA, not with a claim for damages for breach of an individual contract of employment. The time limitation in the *Pope* case was made a condition of processing a claim before the adjustment board and directed to reinstatement only.

Davis v. Union Pacific RR Co., 21 CCH Labor Cases, Par. 66,834 (U.S. D.C., Neb.: 1952) is similar to the case of *Barker v. Southern Pacific Company*, 214 F. (2d) 918 discussed on pages 3-4 herein. The same distinction exists between the *Davis* case and the instant case as between the *Barker* case and the instant case.

United Railroad Workers v. A.T. & S.F. Co., 89 F. Supp. 666 (U.S. D.C., Ill. N.D.; 195) was an action by an employee and a union against a railroad. Defendant's motion to dismiss as to the union was granted. The claim of the individual was not affected and his case was left for further proceedings. This decision gives no support to appellee's position.

The case of *Youmans v. Charleston and W. C. Ry. Co.*, 175 S. Ca. 99, 178 S. E. 671 (1935) held that the availability of a remedy for the settlement and adjustment of grievances through a board under the NLRA did not prevent an employee who claimed he had not been given a fair and impartial hearing under an agreement, from bringing an action for damages without having exhausted such administrative procedures.

McGlohn v. Gulf and S.I.R.R., 179 Miss. 396, 174 So. 250 (1937) was an action by an employee for damages for a summary dismissal without formal investigation. It was held that the declaration was sufficient even though there was no allegation in the declaration that

plaintiff had pursued an appeal procedure provided for in the collective bargaining agreement.

This case supports appellant. Other Mississippi cases, the latest of which is *Dufour v. Continental Southern Lines, Inc.*, 68 So. (2d) 489 (1953) make it clear that under Mississippi law the grievance procedure need not be exhausted before a suit for damages for wrongful discharge may be maintained.

The remaining two cases cited on page 13 of appellee's brief, *Crow v. Southern Ry. Co.*, 66 Ga. 608, 18 S. E. (2d) 690 (1942) and *Hornsby v. Southern Ry. Co.*, 70 Ga. App. 467, 28 S. E. (2d) 542 (1944) do support appellee's proposition. We believe, however, that they have been effectively overruled by the decision of the Supreme Court of Georgia in *Central Georgia Railway Co. v. Culpepper*, 209 Ga. 844, 76 S. E. (2d) 482 (1953).

5. Appellee next argues that Oregon law requires that a party seeking to recover on a contract show that he has complied with conditions required of him and that contractual terms such as in Article 58 (c) have been upheld restricting time and manner in which rights under the contract can be enforced.

We do not agree that contractual terms such as those stated in Article 58 (c) have in Oregon been held to restrict the right of a discharged employee to maintain an action for damages.

Appellee relies on two Oregon cases in support of the above point. One of these, *Beck v. General Insurance Company*, 29 Or. 403, 42 P. 990 (1895) was discussed in our original brief at page 20. The other, *Ausplund v. Aetna Indemnity Company*, 47 Or. 10, 81 P. 577, 82 P. 12 (1905) is a similar case.

In these cases the limitations were made a condition to civil proceedings. In the instant case Article 58 (c) is not so stated or related to a civil action. Also, the provisions of Article 58 do not simply amount to a time limitation. They comprise, in effect, a special procedure available to an aggrieved employee for the correction of a grievance. In the case of a discharged employee the correction contemplated would be restoration to employment and the claim one for reinstatement.

There is no reported decision of any Oregon court holding that a discharged employee must exhaust a grievance procedure in a collective bargaining agreement before he can maintain an action for damages for breach of his contract of employment. The two unreported cases from the United States District Court for Oregon, cited by appellee, were based on the *Beck* case.

6. On pages 15 and 16 of the Brief for Appellee counsel argue as a matter of construction that the provisions of Article 58 are conditions precedent to a civil action for damages. They state that there is no merit to

appellant's argument that these provisions apply solely to recourse to the NRAB. They then summarize portions of Articles 57 and 58 and conclude that they are unequivocal conditions precedent to maintenance of a civil action.

To repeatedly assume and assert that these provisions are such conditions doesn't make them so.

On page 15, counsel for appellee have emphasized certain language out of Article 58, principally the words "disciplinary cases" and "claim." They would give these words a broad meaning to include a claim for damages and a case for damages in a civil court. This they do without regard to the context in which the words occur and without consideration of the meaning given these words in the field of collective bargaining.

Counsel also assume, in their argument on page 15, that Articles 57 and 58 are completely integrated and mutually dependent clauses. This is patently incorrect. It appears from the face of the agreement that these articles, while related, are independent articles.

7. At pages 16-18 appellee claims that the conditions of Article 58 are substantially the same as those in *T.W.A. v. Koppal*, 345 U. S. 653 (1953); 199 F. (2d) 122 (CA-8; 1952), and that the trial court's holding in the present case is in accord with the *Koppal* case.

The opinions of the United States Supreme Court and of the Court of Appeals in this case do not contain a

verbatim recital of the relevant provisions of the collective bargaining agreement. It is not possible from either or both opinions to get a complete description of the provisions establishing the grievance procedure or to evaluate the relationship between the "dismissal procedure" and the "grievance procedure." It does appear that the provision for appeal to the chief operating officer of the company and to the System Adjustment Board were permissive and not mandatory in their expression. The Supreme Court did not have occasion to consider the significance of the use of permissive language or to even consider the construction to be given the provisions of the agreement. The court simply applied what it conceived to be the law of Missouri. This conception was based on a decision of the Missouri Court of Appeals in *Reed v. St. Louis Southwestern R. Co.*, 95 S.W. (2d) 887 (Mo. App. 1936), from which the Supreme Court quoted in footnote 3 of its opinion.

We submit the holding of the *Reed* case is erroneous as a matter of contract law and would not be followed by Oregon courts. It is significant that there is no decision of the highest appellate court of Missouri which adopts this view. All of the reported decisions of the state courts of Missouri are those of lower appellate courts.

None of the Missouri decisions note the distinction between the reinstatement remedy and the damage

remedy. None consider the significance of the use of permissive language or give consideration to the intention of the parties to the agreement. They adopt the rule that where a procedure for redress is provided under the contract that procedure, as a matter of law, must be followed before resort to a civil court.

8. Likewise, on pages 16-18 of its brief, Appellee urges that the case of *Barker v. Southern Pacific Company*, 214 D. (2d) 919 (CA-9; 1953) is authority for appellee's interpretation of the collective bargaining agreement. For the reasons advanced in pages 22-23 of our original brief and on page 4 herein, we believe the *Barker* case must be distinguished.

We also believe it significant that opposing counsel have not cited any decision of the Supreme Court of California or of the California Court of Appeals in this type of action. We have found no decision of a California appellate court in this precise situation.

Examination of the cases cited by appellee under this point fails to disclose that one case of those cited is a decision of the highest appellate court of any state.

9. Appellee, on page 19, asserts that the cases cited by appellant on pages 32 and 33 of his brief are not applicable. It is claimed that the cases of *Dufour v. Continental Southern Lines, Inc.*, 219 Miss. 296, 68 So. (2d) 489 (1953) and *Thompson v. Moore*, 233 F. (2d)

91 (C.A.-5; 1955) do not reach the question of expressed contractual conditions.

The contractual provisions in the *Dufour* case were different than those in the present case, but were, if anything, more favorable to appellee's contention that the contract procedure must be pursued. Section 3 of Article X of the agreement contained provision for a dismissal procedure similar to that in the *Barker* case. Failure to request a hearing was stated to constitute a forfeiture of "any" claim. The section further provided for "appeals." The appeal procedure is not described in the opinion of the court but it obviously was directly related in the agreement to the "dismissal procedure."

In the case of *Thompson v. Moore*, it is true that there were no expressed contractual provisions for a grievance procedure. The defendant relied upon an alleged agreement built up by custom. The Court of Appeals, however, recognized the Texas Rule to be that exhaustion of administrative remedies under the contract of employment was not required under Texas law. The lower court, on the authority of a decision of the Texas Supreme Court, had overruled the defendant's motion to dismiss based on the ground of failure to exhaust contract remedies. This ruling was held not to be reversible error.

Certiori was denied in the *Thompson* case by the United States Supreme Court on October 24, 1955.

REPLY TO APPELLEE'S PROPOSITION "B"

This proposition consists of two general contentions:

1. That there are no facts which would excuse appellant from compliance with the provision of Article 58, and

2. That the appellant waived the right to contend he was excused from such compliance by filing a grievance as provided in Article 58.

1. Appellant has not referred to any facts which would excuse him from compliance with the provisions of Article 58.

a. On pages 20 to 22 appellee undertakes to state various facts that were stipulated to or contended for by the appellant in the Pre-Trial Order. We have no particular quarrel with any of this material except the assertions on page 21 that Mr. M. S. Felter, appellant's union representative, recognized the applicability of the steps provided in Article 58 by writing a letter dated January 10, 1953, to the superintendent and that the letter of January 10th was accepted by appellee as a presentation of appellant's grievance as required by Article 58 (c). There are no facts, either stipulated or contended, from which these conclusions can be fairly drawn. The only evidence in the record relating to these two assertions consists of Felter's letter of January

10th and the superintendent's reply of January 12, 1953. (R. 19-20). In his letter Felter requested favorable consideration for the reinstatement of Peoples and gave a short summary of the circumstances under which Peoples was absent from work. There was no reference made to Article 58 or any portion of the collective bargaining agreement.

It is hardly reasonable to conclude from the language of the letter itself that the author intended anything more than an informal effort to secure reconsideration of appellee's dismissal of Peoples.

It is to be noted that M. S. Felter was a representative, not of the BRT which had the collective bargaining agreement, but of the United Railroad Operating Crafts, a different labor organization.

In his letter, the superintendent, Mr. Hopkins, made no reference to Article 58 nor indicated that he considered that Peoples had submitted a grievance or claim under Article 58.

We believe, therefore, that both of these assertions are unsupported by the facts properly before the Court.

b. In the same connection appellee claims in its brief on page 22 that it is significant that Mr. Felter's letter of January 10th does not assert or refer to any alleged defect on the part of appellee in the matter of notice or hearing in the handling of the appellant's

dismissal. We fail to see any significance in this omission. Mr. Felter stated in his letter certain alleged facts with which the appellee presumably was not familiar. He probably considered it unnecessary to refer to facts with which the appellee was fully familiar, namely, that appellant had not received notice of the hearing or attended or been represented at the hearing.

c. Appellee argues on pages 20 and 21 at various points that it is unreasonable to contend that the means provided in Article 58 for reviewing and rectifying erroneous action is not applicable to this case; that appellant cannot insist upon the benefits of the agreement and at the same time disavow his obligations; and that the appellant cannot, a year and a half after his dismissal, make the contention that compliance with the agreement was excused.

No reasons are given in support of these assertions except in the paragraph on page 20 of brief in which appellee states what it considers to be the purposes of Article 58, namely: (1) That it gives a high company officer a chance to review action and correct errors and (2) that it protects the parties to the agreement from the assertion of stale and vexatious claims.

On pages 43 and 44 of our original brief we pointed out that in this case the first purpose could not have been accomplished by use of the grievance procedure.

The second purpose stated by the appellee for Article 58, that of foreclosing the presentation of stale and vexatious claims would appear to have particular application to reinstatement claims, involving as they do the continued relations of the employer, union and employees represented by the union. No considerations are pointed out by appellee which would make this purpose relevant to a suit for damages by an employee who accepts his termination as permanent. On the contrary, it would appear that the exhaustion of the procedure would only prolong the institution of a civil action and the final adjudication and settlement of the claim.

On pages 22 and 23 of its brief appellee states that in most of the cases which it has cited the claim of a wrongful dismissal was coupled with a claim that the carrier had failed to accord a proper hearing or investigation under the agreement. They referred to two unreported cases and to *Wallace v. Southern Pac. Co.*, (U.S. D.C., N.D. Cal. S. D. 1951), 106 F. Supp. 742 and *T.W.A. v. Koppal*, 345 U. S. 653 (1953), 199 F. (2d) 117 (1952).

In the *Wallace* case, so far as the reported decision discloses, no contention was made by the plaintiff that compliance with Article 58 was excused and the brief opinion of the court does not consider this idea. Moreover, there was a conclusion of law made by the court that defendant had complied with each and every provision of the agreement and particularly with Article 57.

In the *Koppal* case it appears from the opinion of the Court of Appeals that plaintiff had claimed that he was not given a fair hearing and the court stated that the record contained evidence from which it could have been found that this was so. In holding that the plaintiff was not required to exhaust his remedies under the contract the decision of the Court of Appeals was based not on any finding that compliance with the grievance procedure was excused but on the conclusion that the federal law governed and that under federal law exhaustion of such remedies was not required. It was for this reason that the case was reversed by the United States Supreme Court. In the decision by the United States Supreme Court no consideration was given to the question of whether under Missouri law the plaintiff was excused from pursuing the grievance procedure of the contract. The decision does not disclose that any such contention was made by the plaintiff in the case before the Supreme Court.

d. On page 24 of its brief, appellee disputes and criticizes appellant's citation of the study made of awards of the National Railroad Adjustment Board, First Division, by the Institute of Industrial Relations of the University of California. Appellee states that the awards mentioned in the quotation from this study on page 40 of appellant's brief are old cases. Since there is no public

library in the State of Oregon which receives the awards of the NRAB, appellant used what appeared to be the best available recent study of the decisions of the Board. We believe the study is authoritative.

Appellee, on page 24, cites a decision of a special adjustment board upholding an investigation conducted in the absence of the claimant. It appears from appellee's description of this case that a registered letter had been sent to claimant at his last known address, which was returned unclaimed. Presumably the board found this to have been sufficient compliance with some provision of the contract requiring such notice. Under the facts of that case the letter may have been sufficient compliance. In the present case, however, it appears that the notice was never sent to appellant's last known address or through the usual channels employed by the appellee in giving notice to its employees.

Appellee also disputes appellant's citation of the case of *New Orleans Public Belt R. Comm. v. Ward*, 195 F. (2d) 829 (CA-5; 1952). We submit that analysis of this case will show that it does support appellant's position.

2. Appellant has waived his right to contend that he was excused from compliance with Article 58.

It is asserted by appellee on page 21 that appellant cannot avoid the fact that he waived such excuse by

virtue of the letter of M. S. Felter to the superintendent dated January 10, 1953.

No reasons are given or cases cited in support of this proposition. We have already noted above that the record does not support this conclusion, which appellee's counsel have urged, that Felter's letter was intended as the submission of a grievance or that it was accepted as such, *supra*, pages 13-14. We are unable to understand how such a submission, even if it had been made, would have worked a waiver of any kind. There is nothing to indicate that the appellee changed its position as a result of Felter's letter or that it was prejudiced in any way.

In making this contention counsel are apparently trying to say that by writing this letter the appellant made an election to proceed through the grievance procedure of the NRAB rather than a proceeding in a civil action. It is true that the two remedies are mutually exclusive and it has been held that where an employee has successfully sought reinstatement through the NRAB he is barred from bringing an independent action for damages. However, the filing of a grievance preliminary to the NRAB procedure does not constitute an election.

Keel v. Ill. Terminal R.R. Co., 346 Ill. App. 169, 104 N. E. (2d) 659 (Ill.; 1952).

The appellee in its statement of contentions in the Pre-Trial Order did not advance this proposition as one of its contentions in the case.

Respectfully submitted,

WILLIAM A. BABCOCK,

BABCOCK, RUSSELL & McGEORGE,

Attorneys for Appellant

No. 14799

United States
Court of Appeals
for the Ninth Circuit

GEORGE PEOPLES,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corpora-
tion, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

OCT 11 1955

PAUL P. O'BRIEN, CLERK



No. 14799

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Appellee.



In the United States District Court for the District
of Oregon

Civil No. 7558

GEORGE PEOPLES, Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corpora-
tion, Defendant.

MOTION

Defendant respectfully moves the court (pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure) for judgment in its favor and against the plaintiff on the ground and for the reason that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law.

This motion is based upon the pretrial order, heretofore executed and approved by the parties, the depositions and the collective bargaining agreement between the defendant and the Brotherhood of Railroad Trainmen.

Respectfully submitted,

/s/ KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,

/s/ JOHN GORDON GEARIN,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above entitled cause came on regularly for pretrial conference before the undersigned judge of the above entitled court on the 7th day of March, 1955. Plaintiff appeared in person and by William A. Babcock, his attorney. Defendant appeared by John Gordon Gearin, of its attorneys, and by W. A. Gregory, of counsel. The following proceedings were had:

Facts Agreed Upon

I.

Plaintiff is a citizen, resident and inhabitant of the State of Oregon. Defendant is a Delaware corporation duly authorized to do business in the State of Oregon.

II.

The action is one of a civil nature and the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

III.

At all times material herein, defendant was engaged in the business of a common carrier by rail in interstate commerce and was engaged in such business in the State of Oregon. Defendant and some of its employees, including plaintiff, were subject to the terms and provisions of the National Railway Labor Act.

IV.

On December 16, 1939, defendant entered into a written collective bargaining agreement with the Brotherhood of Railroad Trainmen as the duly designated collective bargaining representative of certain of its employees, in the class or craft of trainmen, including employees in the position of brakemen. This agreement, entitled Schedule of Pay and Regulations for Trainmen, as amended from time to time, was in full force and effect at all times material herein. The collective bargaining agreement referred to above contained the following provisions:

“Article 47. Seniority Rights. Section (a). Yard employees will have no rights in train service, and vice versa, but if temporarily so assigned shall not lose their rights therein within sixty (60) days.

“Note: The above not to apply to trainmen used in yard service, who, account slack business, are unable to work 50% of the time as trainmen. Local Chairman and Local Officials shall determine percentage by checking back for a period of fifteen (15) days.

“Note: See Interpretation Agreement of April 2, 1942, TRN 1-299—Appendix “B”.

“Section (b). Freight trainmen in service June 1st, 1926, will be given rights as passenger trainmen in the order in which they rank as freight trainmen, but will follow and be junior to passenger brakemen in service June 1st, 1926.

“Section (c). Passenger trainmen in service June 1st, 1926, who are not over forty-five (45) years of

age, will be given rights as freight trainmen in the order in which they rank as passenger trainmen, but will follow and be junior to freight trainmen in service June 1st, 1926.

“Section (d). All trainmen entering service on and after June 1st, 1926, will qualify and hold rights in both passenger and freight service.

“Section (e). A passenger trainman acquiring rights as freight trainman under Section (c), will not be promoted to conductor until he has had at least two years' experience as freight trainman on railroad or railroads operated under American Railway Association Rules, and at least six (6) months of such experience shall be immediately prior to date of promotion and on division on which promoted. Time such trainmen are regularly assigned to assigned passenger service and/or regularly assigned to exclusive passenger trainmen's extra lists will be excluded in figuring their experience in freight service for promotion.

“Section (f). Universal rights of trainmen in steam service on Western District-Western Division, with trainmen in service on the Electric Lines of the Western District-Western Division, and vice versa, also promotion of gatemen in Western District-Western Division Electric service to positions of trainmen in both electric and steam service, will be governed by supplementary agreements which were in effect at the time this Agreement is executed, and thereafter subject to such changes, revisions or amendments, as may hereinafter be mutually agreed to by the parties to this Agreement.

“Seniority rights of trainmen of the former N.C.O. Railroad will be governed by supplementary agreements which were in effect at the time this Agreement is executed, and thereafter subject to such changes, revisions or amendments, as may hereinafter be mutually agreed to by the parties to this Agreement.

“Section (g). On divisions where there is sufficient passenger work to warrant assignment of trainmen to extra passenger service, it will be done, and these trainmen will provide themselves with uniforms. Local Committee, B. of R. T., and Local Officials will arrange to keep the number of brakemen on assigned extra lists reduced so that trainmen assigned thereto will earn approximately a regular passenger trainman’s monthly salary.

“Note: See Memorandum of Agreement of August 31, 1950, TRN 1-663—Appendix “B.”

“Section (h). At points where exclusive passenger lists are not maintained a sufficient number of extra trainmen will be required to provide themselves with uniforms and such men will have preference in filling passenger vacancies.

“In case extra trainmen decline to provide themselves with uniforms to properly take care of the extra passenger work the Company is privileged to hire men to man the service.

“Section (i). Trainmen with uniforms may be called for passenger service in the order of their seniority in preference to senior trainmen without uniforms. This not to conflict with the provisions of Article 16.

“Section (j). Trainmen who have not sufficient seniority to enable them to work with any degree of regularity on the division or seniority district where they hold seniority, may accept temporary transfer to another division or seniority district where additional men are required. Trainmen so transferred will be furnished necessary transportation for themselves and will deadhead to and from the point to which transferred on their own time.

“Trainmen temporarily transferred will take seniority rank on the district to which transferred as of date of first service, and shall retain such rank until released as a result of either the trainman’s own request, or being recalled to home division, or reduction in force. Should a trainman desire to make a permanent transfer to the division or seniority district to which temporarily transferred, and same is approved by Superintendents involved, seniority rank on the division or seniority district to which transferred will be as of 12:01 a.m. of date transfer is approved.

“Superintendents will furnish Local Chairmen, BRT, names of men borrowed from another division, or seniority district, showing seniority date of such men on the division or seniority district to which transferred.

“Should additional trainmen be hired on a division or seniority district during period borrowed men of another division or seniority district are working on said division or seniority district, such borrowed men will rank ahead and be senior to men so hired; however, when the working list is reduced,

the borrowed men will be first reduced in reverse seniority order. Superintendents will furnish Local Chairmen, BRT, names and date such men are removed from the seniority list.

“Trainmen voluntarily leaving the service of the Company lose all rights and if they again enter the service must take their place as new men.

“Section (k). Superintendents will prepare seniority lists of all trainmen under them, and have it open for inspection when requested. The list to be revised semi-annually, and each Chairman of Local Committee of B. of R. T. will be furnished a copy.

“Note: See letters of October 29, 1941, and November 7, 1941, TRN 154-269—Appendix “B.”

“Section (l). Trainmen in service on former N.C.O., on September 1st, 1929, will be given seniority rights as trainmen on West end of Salt Lake Division in the seniority order in which they rank on the former N.C.O. and will follow and be junior to trainmen on the seniority list of the West end of the Salt Lake Division, as of July 1st, 1937.

“Article 57. Discipline—Investigations. Section (a). When a trainman believes he has been unjustly treated, he shall have the right to present his case in writing, or through his Local Committee, to the Superintendent, with such evidence as he may have to offer. It will be the duty of the Superintendent to investigate the matter and render his decision in writing, without unnecessary delay. Should such decision be unsatisfactory it may on written notice to the Superintendent, be appealed to General Manager or his delegated representative.

General Chairman of the Brotherhood of Railroad Trainmen will be furnished copy of decision rendered on appeal.

“Section (b). No employe covered by this agreement will be disciplined or discharged without a fair and impartial formal investigation before a proper officer of the Company. At such investigation he will be entitled to be represented by the Local Chairman of his Organization, or by an employe of his choosing in the same grade of service on the employe’s seniority district. Nothing herein restricts suspension in proper cases pending investigation, which shall be prompt, ordinarily within five (5) days.

“Section (c). When a formal investigation is to be held the employe shall be given written notice as to the specific charge, time and place, sufficiently in advance to afford him the opportunity to arrange representation and for the attendance of any desired witnesses. A telegram will be considered written notice. The Company will require the presence of all employes whose testimony may be necessary to develop all of the essential facts. In fixing time at which investigation will be held due consideration will be given to the need of rest by employees.

“Section (d). Interrogations will be made by the presiding officer of the Company who is holding the investigation. After he has completed the direct examination, other Company officers present may interrogate the witness. The accused and/or his representative shall be confronted with all of the evidence, may hear the testimony of all witnesses and

shall be privileged to question any or all who may so testify. Each witness may, after testifying, remain present until the investigation is concluded. All questions and answers that constitute a part of the investigation shall be included in the transcript, also should the employe or his representative make verbal protest in regard to any question that he may consider unfair or ambiguous, such protest will be included in the record.

“Section (e). Any disciplinary action taken by the company shall be based upon the evidence adduced at the investigation, and employe or his representative notified of decision without undue delay; not exceeding thirty (30) days.

“Section (f). Where discharge (or suspension) is found to have been unjust, the employe shall be returned to service and paid for wage loss.

“Section (g). Should one or more employees involved not be available account sickness or injury, the investigation will be conducted with those who are available, and decision rendered as provided for in this Article. When the physical condition of those sick or injured will permit, investigation will be reconvened; those previously attending will be notified and will attend and participate should they, or either party to the investigation, desire their presence.

“Section (h). Trainmen taken from their runs for investigation if found innocent, or if required only as witnesses, shall be paid for all time lost, and when called as witnesses or for depositions and stenographic statements and lose no time, shall be

compensated at one-eighth of the daily rate of last service performed from time required to report until time released, with a minimum of one (1) hour.

“Note: See Interpretation Agreement of May 10, 1948, TRN 1-553—Appendix “B.”

“Section (i). When employees make written or typewritten statements at the request of the Superintendent, or his representative, if such statements do not include questions asked by the Superintendent, or his representative, and answers made by the employe, it will not constitute an investigation under this Article, but if such statements do include questions and answers as herein described, it will constitute an investigation and be subject to the provisions of this Article.

“It will not be permissible for clerks to conduct investigations; however, clerks may interview employes and take their statements in connection with irregularities which may or may not later require an investigation. Interviews and statements taken by Police Department will be confined to matters coming within the authority of Company Police Department.

“Section (j). Trainmen will not be required to sign waiver of investigation.

“Section (k). Should Chairman of Local Committee request a transcript of the testimony in any investigation that has been made, it will be furnished; Local Chairman will also be furnished copy of any additional statements or evidence which may be used against the accused in assessing discipline.

“Article 58. Limitation in Presenting Grievances. Section (a). The General Committee of the Brotherhood of Railroad Trainmen will represent all trainmen in the making of contracts, rates, rules, working agreement, and interpretations thereof.

“Section (b). The right of any employe desiring representation in the handling of his grievances or complaints by the Brotherhood of Railroad Trainmen under the recognized interpretation of the Agreement involved is conceded.

“Section (c). Item 1: Any claim of trainman not submitted in writing within 90 days of the date of the occurrence on which claim is based will be deemed to have been abandoned.

“Item 2: When time claims made within 90 days of the date of occurrence are declined, the employe affected, or his authorized representative, shall have 90 days from the date of notice declining claim to present a written grievance covering the claim to the Superintendent. If grievance is not filed within such 90-day limit the claim will be deemed to have been abandoned.

“Item 3: If grievance is filed within the 90-day limit, as provided in Item 2, and the claim is again declined, the employe, or his representative, shall have 90 days from the date of the latest decision of the Superintendent to advise the Superintendent in writing of intention to appeal to higher officer. If such notice of appeal in writing is not given the Superintendent within the required 90-day limit, the claim will be deemed to have been abandoned. General Chairman of the Brotherhood of Railroad

Trainmen will be furnished copy of decision rendered on appeal.

“Item 4: The above time limitations embodied in Items 2 and 3 shall also apply to disciplinary cases.

“Item 5: Time claims and disciplinary cases which have been denied by the Superintendent shall be submitted to the highest general officer of the carrier designated to handle such claims and cases and discussed in conference with said officer within one (1) year from the date of one of the following conditions, whichever is the latest:

- (a) Superintendent's last letter denying the claim or case;
- (b) Date of Local Chairman's letter notifying Superintendent of his intention to appeal the claim or case;
- (c) Date of Superintendent's letter submitting proposed Joint Statement of Facts;

subject to extension by mutual agreement. If not handled as herein prescribed, such claim or case will be deemed to have been abandoned.

“Item 6: The following provisions of Section 4(c), Item 2, of the Agreement made at Chicago, Illinois, December 12, 1947, reading:

‘Decision by the highest officer designated by the carrier to handle claims shall be final and binding unless within one year from the date of said officer's decision such claim is disposed of on the property or proceedings for the final disposition of the claim are instituted by the employe or his duly authorized representative and such officer is so notified. It is understood,

however, that the parties may by agreement in any particular case extend the one year period herein referred to.'

is interpreted to mean that the decision by the highest officer designated by the carrier to handle time claims shall be final and binding unless within one (1) year from the date of said officer's decision (made subsequent to discussion of the case in conference as provided in Item 5) proceedings for final disposition of the claim are instituted by the employe or his duly authorized representative and such officer is so notified, subject to extension by mutual agreement.

"Item 7: Unless an overpayment to a trainman for services rendered as a trainman is deducted by the Company within a period of 90 days after the date of the pay roll containing such overpayment, no deduction account such overpayment will thereafter be made, except when such overpayment results from clerical or accounting errors.

(Revised effective November 1, 1949)

"Section (d). Trainmen who are dismissed may be re-employed at any time; but will not be reinstated unless case is pending in accordance with provisions of Section (c) of this Article."

V.

On July 21, 1947, plaintiff was hired in the State of Oregon by defendant as brakeman and remained in its employ in this position in Oregon until November 24, 1952. During this time, plaintiff was employed within the craft or class covered by the

above described collective bargaining agreement and subject to the terms and provisions thereof.

VI.

On or about August 29, 1952, plaintiff was working as a brakeman from the extra board in Roseburg, Oregon. He had no regular assignment and worked on call by the defendant when and if work was available. During the year 1952 he had earned each month the following amounts:

1952

Jan.	1/P	NT
	2/P	246.96
Feb.	1/P	229.71
	2/P	44.09
Mar.	1/P	230.48
	2/P	131.50
April	1/P	303.13
	2/P	236.08
May	1/P	302.16
	2/P	220.13
June	1/P	105.16
	2/P	245.87
July	1/P	254.36
	2/P	76.19
Aug.	1/P	280.03
	2/P	114.36
Sept.	1/P	12.59
	2/P	NT
Oct.	1/P	210.74
	2/P	NT
Nov.	1/P	NT
	2/P	NT

Plaintiff was absent from work from August 29, 1952, until the date of his termination.

VII.

At that time, plaintiff resided at Ashland, Oregon.

VIII.

On November 5, 1952, defendant directed a letter by United States registered mail, addressed to plaintiff at Neil Creek Road, Ashland, Oregon. This letter was returned unclaimed to defendant on November . . . , 1952. This letter read as follows:

“Mr. George D. Peoples (Brakeman), Neil Creek Road, Ashland, Oregon. Our records show that you have been absent from work since August 29th, 1952, without proper authority. If this is a fact your absence is in violation of Rule 810 and unless it is due to good and proper reason, it is sufficient cause for the termination of your employment with this Company.

“You are, therefore, notified to appear for investigation at the Trainmaster’s Office, Roseburg, Oregon, at 10:00 a.m., Tuesday, November 18th, 1952, to cover your above-mentioned unauthorized absence.

“You are entitled to representation in accordance with the Trainmen’s Agreement and to bring to the investigation such witnesses as you may desire.

/s/ T. W. Bernard, Trainmaster.”

IX.

A formal investigation of charges against plaintiff was held at Roseburg, Oregon, before Mr. T.

W. Bernard, trainmaster, on November 18, 1952. A transcript of the investigation was made, which accurately sets forth the proceedings had. Following such investigation, Mr. Bernard recommended that plaintiff's employment be terminated for violation of Rule 810 of defendant's General Rules and Regulations.

X.

On November 24, 1952, L. P. Hopkins, Superintendent of the Portland Division, concurred with Mr. Bernard's recommendation and effectively directed that plaintiff's service be terminated as of that date for violating Rule 810.

XI.

On or about that date a letter was directed to plaintiff by defendant by United States mail, registered, addressed to plaintiff at Neil Creek Road, Ashland, Oregon. This letter on the 11th day of December, 1952, was returned to defendant unclaimed and read as follows:

"Mr. G. D. Peoples (Brakeman), Neil Creek Road, Ashland, Oregon. Evidence adduced at formal investigation conducted Roseburg November 18, 1952, at which neither you nor your representative was present, established your responsibility for continued absence from duty without proper authority since August 29, 1952.

"Your actions constitute violation Rule 810, Rules and Regulations of Transportation Department.

"For reason stated, your employe relationship

with Southern Pacific Company is hereby terminated.

/s/ L. P. Hopkins"

XII.

Plaintiff was absent from work from August 29, 1952, until his services were terminated on November 24, 1952. Plaintiff was not sick on August 29, 1952 and does not claim that he was unable to report to work because of his own sickness.

* * * * *

The following facts are admitted in addition to the above. However, as to each of them, plaintiff contends that they are not material or relevant to any issue in the case and should not be considered by the court or jury in any proceedings in the case.

* * * * *

XIII.

On January 10, 1952, M. S. Felter, Secretary Local 113, United Railroad Operating Crafts wrote a letter to Mr. L. P. Hopkins, Superintendent, which said letter was received by the office of Mr. Hopkins at Portland, Oregon on January 12, 1953, said letter being in words as follows:

"Mr. L. P. Hopkins, Supt., Union Station, Portland, Oregon. Dear Sir: On behalf of brakeman George Peoples I would like to hereby ask for your favorable consideration of his reinstatement with seniority unimpaired.

"The facts of the case are as follows: On about August 30, 1952 Brakeman Peoples was called to Nebraska by the serious illness of his father. He

laid off "account serious illness in the family." On his arrival at his father's home he found his condition critical and he was not expected to recover. He remained in this condition for some time and Brakeman Peoples complying with his father's pleas remained with him. As soon as his father's condition improved he returned to Oregon and found he had been removed from service.

"Mr. Peoples would like at this time to be permitted to return to service and be reinstated.

"There were several vouchers issued to Mr. Peoples which have been returned to Portland. He would like to have them sent to him at Ashland as soon as possible. Sincerely (signed) M. S. Felter, Secretary Local 113."

And enclosed written authorization executed by plaintiff, a copy of which has been marked Exhibit ..., authorizing the United Railroad Operating Crafts to represent the plaintiff. On January 12, 1953, Mr. L. P. Hopkins wrote Mr. M. S. Felter as follows:

"Mr. M. S. Felter, 321 Alta, Ashland, Oregon. Dear Sir: Your letter January 10th requesting reinstatement of Brakeman George Peoples, dismissed November 24, 1952 account violation Rule 810.

"Regret there is nothing that can be done towards giving favorable consideration to permit Mr. Peoples to return to service of Southern Pacific Company. Yours truly, (signed) L. P. Hopkins."

XIV.

On March 9, 1953, Mr. M. S. Felter wrote Mr.

L. P. Hopkins, said letter being received March 12, 1953, as follows:

“Mr. L. P. Hopkins, Superintendent, Southern Pacific Railroad, Union Station, Portland, Oregon. Dear Sir: At your earliest convenience I would like to confer with you regarding the possible reinstatement of George Peoples. Will you kindly advise me when I may see you in regards to this matter? Thank you. Sincerely, (signed) Marion S. Felter.”

XV.

On March 13, Mr. L. P. Hopkins wrote Mr. M. S. Felter as follows:

“Mr. M. S. Felter, 321 Alta, Ashland, Oregon. Dear Sir: Your letter March 9th relative George Peoples.

“I will be in my office 1:00 p.m., Monday, March 16th and can see you at that time. Yours truly, (signed) L. P. Hopkins.”

XVI.

On March 16, 1953, Mr. L. P. Hopkins wrote Mr. Felter as follows:

“Mr. M. S. Felter, 321 Alta, Ashland, Oregon. Dear Sir: Again referring your letter March 9th relative George Peoples.

“Under date March 13th, I wrote you as follows:

‘Your letter March 9th relative George Peoples.

‘I will be in my office 1:00 p.m., Monday, March 16th and can see you at that time.’

“Inasmuch as you did not show up for this appointment and have heard nothing from you ex-

plaining necessity for postponement, am taking it for granted it is not your desire to discuss the matter and am therefore closing my file. Yours truly, (signed) L. P. Hopkins."

XVII.

On March 19, 1953, Mr. Felter wrote Mr. Hopkins, which letter was received March 23, 1953 as follows:

"Mr. L. P. Hopkins, Superintendent, Room 251 Union Station, Portland 9, Oregon. Dear Sir: Your letter of March 13th evidently did not arrive in Ashland in time to be delivered on Saturday. It was delivered to my home Monday afternoon, March 16th. I did not get it until late Monday evening so it was not possible to keep the appointment at 1 p.m. Monday.

"I wish to thank you for your consideration in trying to arrange an appointment, however, I find there is some more information which must be available before we could discuss the matter further. If this should appear advisable I will again contact you for an appointment. Yours truly (signed) Marion S. Felter."

XVIII.

On August 29, 1953, plaintiff wrote Mr. L. P. Hopkins a letter received September 1, 1953, as follows:

"Mr. L. P. Hopkins. Dear Sir. I wonder if it is possible for me to get reinstated as Brakeman on the Port. Div. If so, I surely would be grateful to you for this deed. How ever if you don't see your way clear to reinstate me would you please send

me a service letter on your R.R. Sincerely, (signed) G. D. Peoples, Gen. Del. Ashland, Ore."

XIX.

On September 1, 1953, Mr. L. P. Hopkins wrote plaintiff as follows:

"Mr. G. D. Peoples, General Delivery, Ashland, Oregon. Dear Sir: Your letter August 29th regarding possibility of being returned to Southern Pacific service.

"Regret there is nothing we can do for you in this regard. Yours truly, (signed) L. P. Hopkins."

XX.

On September 3, 1953, Mr. L. P. Hopkins sent plaintiff Certificate of Service No. 51398.

XXI.

On November 25, 1953, Mr. M. S. Felter wrote to Mr. J. J. Sullivan, Manager of Personnel of Southern Pacific Company as follows. A copy of this letter was received by Mr. L. P. Hopkins.

XXII.

On January 6, 1954, Mr. E. D. Moody of Southern Pacific Company wrote to Mr. M. S. Felter as follows:

"Mr. M. S. Felter, 321 Alta, Ashland, Oregon. Dear Sir: Your letter of November 25, 1953, to Mr. J. J. Sullivan, Manager of Personnel, concerning the case of former Brakeman George D. Peoples, Portland Division, has been referred to me for reply, since I have been designated by the company as the highest general officer, pursuant to the pro-

visions of the Railway Labor Act, for the handling of all disciplinary matters on appeal.

“In reviewing the file, it was observed that no appeal was ever taken from the superintendent’s last decision within ninety days from the date upon which it was rendered to you; hence, according to the clear terms of Article 58 of the current Trainmen’s Agreement, the claim is deemed to have been abandoned, and your request that Peoples be reinstated and allowed compensation for time lost is not now properly before me for consideration. Yours very truly, (signed) E. D. Moody.”

XXIII.

Prior to August 29, 1952, defendant had issued its General Rules and Regulations for employees which were binding upon plaintiff and had from time to time issued certain Special Notices to employees.

XXIV.

Rule 810 of the General Rules and Regulations provided as follows:

“Employes must not engage in other business without permission of the proper officer. They must not absent themselves from their employment without proper authority. They must report for duty at the prescribed time and place, remain at their post of duty, and devote themselves exclusively to their duties during their tour of duty.

“An employe subject to call for duty must not absent himself from his usual calling place without notice to those required to call him.”

Plaintiff had knowledge of this regulation.

XXV.

On December 10, 1951, defendant had issued Special Notice No. 279, which provided as follows:

“Train, engine and yard service employes may not be absent for more than seven calendar days at one time without securing authority from Supervisor (Trainmaster, Road Foreman of Engines or General Yardmaster).

“Crew Dispatchers and others handling crew boards are not authorized to grant leaves for more than seven calendar days.

“In case of illness which may incapacitate an employe for more than seven days, it is necessary that proper advice be given to Supervisor, advice to include name of doctor attending, and written permission must be secured to cover leave.

“Leaves of absence should be anticipated as much as possible so they may be handled in orderly manner.”

XXVI.

On August 29, 1952, plaintiff caused a telegram to be sent from defendant's Ashland station to the crew dispatcher at the extra board in Roseburg, Oregon, reading as follows:

* * * * *

XXVII.

At no time did plaintiff secure authority from a Trainmaster, Road Foreman of Engines or General Yardmaster of defendant to be absent from work and at no time did he procure written leave of absence.

Contentions of the Parties

Plaintiff's Contentions

I.

Plaintiff's contract of employment with defendant included the terms and conditions in the collective bargaining agreement between the defendant and the Brotherhood of Railroad Trainmen. Under the terms of this agreement plaintiff had seniority rights as a brakeman in the Portland Division dating from July 21, 1947, which entitled him to work as a brakeman in that division to the extent that work was available and in order of seniority until he voluntarily quit or his services were validly terminated. Under the terms of his agreement he could not be discharged except in accordance with Article 57, subparagraphs (b), (c), (d) and (e) of the collective bargaining agreement and specifically could not be discharged without a fair and impartial formal investigation after written notice to the plaintiff of the specific charge and the time and place of the investigation.

II.

Plaintiff was discharged on November 24, 1952, without written or any notice to him of the charge and of the time and place of the investigation, and plaintiff had no knowledge of the charge or of the investigation. Plaintiff was never given a copy of the decision. He received no official notice of the decision until January 12, 1953. This action on the part of the defendant was a breach of its contract of employment with plaintiff and also a breach of

such a character that it excused any further performance of the contract of employment on the part of plaintiff.

III.

Plaintiff has fully performed all terms and conditions of his contract of employment on his part to be performed.

IV.

Article 57, subparagraph (a) of the collective bargaining agreement by its terms provides for a voluntary procedure on the part of the employees and does not require that an employe who is discharged use such a procedure. If it should be held that it was necessary under the facts and circumstances of the present case for plaintiff to use such procedure before filing an independent action for damages for breach of his contract of employment then plaintiff contends he has fully complied with this procedure.

V.

Article 58 of the collective bargaining agreement is to be construed with Article 57, subparagraph (a) of the agreement and by its terms provides for a voluntary procedure and does not require an employe who has been discharged to use such procedure in order to maintain an action for damages.

VI.

Because of the nature of the breach of the contract by the defendant the plaintiff was excused from using any of the grievance procedures pro-

vided for in the agreement even if such procedures are found to be mandatory in their terms and applicable to plaintiff's case.

VII.

The grievance procedures in Article 58 of the agreement contemplate proceedings before the National Railroad Adjustment Board and are preliminary to such procedures only and not preliminary to or prerequisites for an independent action for damages for breach of the contract of employment.

VIII.

It would have been futile for the plaintiff to have used or exhausted the contractual procedures and he is therefore excused from using them even if these procedures were otherwise required of him.

IX.

The plaintiff under applicable law as a result of his discharge by the defendant had the election of treating his contract as terminated and his discharge as a breach thereof, or of treating his discharge as void and seeking enforcement of the contract through the grievance procedures of the collective bargaining agreement and the administrative procedures of the National Railroad Adjustment Board. Plaintiff elects to treat his discharge as an effective breach of the contract and seeks his remedy in damages against the defendant.

X.

The action which has been taken by the plaintiff and on his behalf does not amount to an elec-

tion on the part of the plaintiff to resort to the administrative procedures of the National Railroad Adjustment Board which precludes his recovery of damages in an independent action.

XI.

Plaintiff has been damaged by the defendant's breach of his contract of employment in that he otherwise would have been entitled to and would probably have continued in the service of the defendant until he had reached retirement age. The amount of plaintiff's damage consists of the amount of earnings he has lost to date less the amount he did earn or could have earned by use of reasonable diligence, and the present value of the amount he probably would have earned as an employe of the defendant from this date until age 65, less the amount he probably will earn until that age or probably can earn by use of reasonable diligence. Plaintiff waives his claim for damages due to the loss of retirement benefits. The amount of plaintiff's damage for past wage losses consists of \$. The amount of damages for his future wage losses consists of \$. The burden of proof is on defendant to establish any reduction of damages by way of mitigation.

XII.

The defendant is not in any way excused from its failure to give plaintiff notice of the charges against him and the time and place of its investigation and affording him a fair and impartial investigation. Defendant had knowledge of plaintiff's

true address at the time by virtue of the knowledge of its agent at Ashland, to whom the plaintiff, by rule of the defendant and customary and accepted practice of the defendant, was instructed to report his address. Defendant did not make a reasonable effort to give such notice to the plaintiff and did not send the notice in the customary and accepted way, namely to the agent or chief clerk of plaintiff's home terminal, Ashland, Oregon, for delivery to plaintiff. It did not send it to plaintiff's last known post office address in Ashland, namely, P. O. Box 321. Defendant did not attempt to learn of plaintiff's address or whereabouts from the persons who would normally have been expected to know such address, namely, the agent and chief clerk at the defendant's station in Ashland, Oregon, and plaintiff's neighbors and landlord at Ashland, Oregon.

XIII.

The present action does not involve the issue of whether defendant had cause to discharge the plaintiff or whether plaintiff could have been justly discharged had the defendant complied with the provisions of plaintiff's contract of employment in effecting such discharge.

If it is held that the merits of the discharge are involved in the present case then plaintiff would make the following additional contentions with respect to such subject.

XIV.

It was customary and accepted practice in the Portland Division of the defendant's operations for

employees to lay off work for personal reasons for indefinite periods without securing any written leave of absence after seven days' absence.

XV.

It was also customary and accepted practice for employees who wished to lay off for personal reasons to notify the defendant that they were "laying off sick" and in such cases they were not expected or required to return until they were requested to do so. Such request to return to work was customarily and by practice given to the employe through the agent of the defendant who was in charge of operations in the employe's home terminal which, in this case, would have been the agent at Ashland, Oregon.

XVI.

On or before September 10, 1952, plaintiff notified defendant's station agent at Ashland, Oregon, that his post office address would be c/o E. B. Peoples, Avoca, Nebraska for an indefinite period and to mail his check to him at that address.

XVII.

The agent at Ashland, Oregon, at all times from on or before September 10, 1952, knew the plaintiff's address and could have got word to him to return to work.

XVIII.

On August 28, 1952, plaintiff learned that his father was critically ill at Avoca, Nebraska. He was requested by a member of the family to come to Nebraska to see his father. He thereupon notified

the person in charge at the Roseburg extra board, namely, the crew dispatcher, of these facts and was told he could have leave for this purpose on giving notice to that office. He gave such notice by telegram on August 29. Thereafter, plaintiff did not receive any notice to return to work. He was required to be absent because of his father's illness until on or about December 1, 1952, at which time he reported for work at Roseburg. He did not engage in any other business or occupation during this period. He had authority from defendant to be absent during this period.

XIX.

Other employees in the past had been absent for similar reasons for indefinite periods without being suspended from service and without disciplinary actions being taken against them.

XX.

Plaintiff had no knowledge of Special Notice No. 279 and the provisions of said notice were not complied with or followed in the operations. Plaintiff contends that he was given indefinite leave of absence by the crew dispatcher in Roseburg and this was binding on defendant and was not required to return to work until requested to do so as long as the cause for his leave reasonably continued.

XXI.

Alleged violation of Special Notice No. 279, and alleged financial difficulties of plaintiff were not given by defendant as a reason for plaintiff's dis-

Plaintiff had knowledge of this regulation.

charge or contained in the charges against him and did not constitute a valid basis for discharge or actually serve as such. Defendant is estopped and barred from urging them as such in the present action.

XXII.

Plaintiff's discharge was without good cause and was unjust.

* * * * *

Defendant denies each and all of the foregoing contentions on the part of plaintiff.

Defendant's Contentions

I.

Defendant contends that plaintiff was employed by Southern Pacific Company under a contract of employment terminable at will by either party.

Plaintiff denies the foregoing.

II.

Defendant contends that the contract between defendant and its employee represented by the Brotherhood of Railroad Trainmen did not alter or terminate the common law right of defendant to hire or to discharge or to terminate plaintiff's services at will.

Plaintiff denies the foregoing.

III.

Defendant contends that if said contract did limit the defendant's common law right to discharge or to terminate plaintiff's services at will and require

that discharge be for good cause, then and in that event defendant had good cause for discharging plaintiff for violation of General Rule and Regulation No. 810, for failure to comply with Special Notice No. 279 and for long continued absences from work.

Plaintiff denies the foregoing.

IV.

Defendant contends that plaintiff was absent from work for more than seven calendar days at one time without securing authority as provided in Special Notice No. 279 from a supervisor; i.e., trainmaster, road foreman of engines or general yardmaster.

Plaintiff denies the foregoing.

V.

Defendant contends that defendant made every reasonable effort to locate plaintiff and to give him notice of the investigation held on November 18, 1952 was compliance with the collective bargaining agreement.

Plaintiff denies the foregoing.

VI.

Defendant contends that plaintiff has neither followed the appeal procedure nor complied with the time limitation set forth in the contract between defendant and its employees represented by the Brotherhood of Railroad Trainmen, that the proce-

dures set forth are exclusive and plaintiff may not assert his rights, if any, under said contract in this proceeding.

Plaintiff denies the foregoing.

VII.

Plaintiff voluntarily absented himself from his employment without proper authority, notwithstanding the express requirement of Special Notice No. 279 and General Rule and Regulation No. 810 and instead of being sick was then in good health from August 29, 1952 until after November 24, 1952.

Plaintiff denies the foregoing.

VIII.

Defendant contends that plaintiff is wholly barred and estopped by his delay and failure to comply with the grievance procedure as set forth in Article 58 of the collective bargaining contract between defendant and the Brotherhood of Railroad Trainmen to seniority rights accruing to him under said contract or to damages for alleged breach of said contract by defendant.

Plaintiff denies the foregoing.

IX.

Plaintiff in permitting his financial distress and difficulties to be brought to the attention of the defendant was guilty of violating General Rule and Regulation No. 810.

Plaintiff denies the foregoing.

X.

Plaintiff has not minimized his damages by attempting to seek other employment.

Plaintiff denies the foregoing.

XI.

Plaintiff may not assert the instant claim against defendant when he has not complied with Article 54 of the agreement.

Plaintiff denies the foregoing.

XII.

Neither the court nor a jury can substitute its judgment for that of company officers exercised in good faith as to the measure of discipline to be assessed against a railroad employee for infraction of its rule.

Plaintiff denies the foregoing.

Physical Exhibits

Certain physical exhibits have been identified and received as pretrial exhibits, the parties agreeing, with the approval of the court, except as otherwise indicated, that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the ground of relevancy, competency and materiality.

Plaintiff's Exhibits

1. W-2 Withholding Statement, year of 1951 to George Peoples from Southern Pacific Company.

2. W-2 Withholding Statement, year of 1952 to George Peoples from Southern Pacific Company.

3. Cancelled check of Southern Pacific Company to George Peoples for second payroll period of August, 1952.

4. Cancelled check of Southern Pacific Company to George Peoples for first payroll period of September, 1952.

5. Cancelled check of Southern Pacific Company to George Peoples for first payroll period of October, 1952.

Jury Trial

Plaintiff made timely request for trial by jury.

The parties hereto agree to the following pretrial order.

Dated at Portland, Oregon, this 7th day of March, 1955.

/s/ GUS J. SOLOMON,
Judge

Approved:

/s/ WM. A. BABOCK, Attorney for Plaintiff.

/s/ JOHN GORDON GEARIN, of Attorneys
for Defendant.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Cause.]

MOTION

Plaintiff moves the Court (pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure) for a judgment in his favor and against

the defendant on the issue of liability of the defendant, reserving for trial the issue of the amount of damages sustained by plaintiff.

This Motion is made upon the ground that there is no genuine issue as to any material fact relating to the question of liability of the defendant, and the plaintiff is entitled to interlocutory judgment with respect to liability as a matter of law.

This Motion is based upon the pretrial order, the answers to interrogatories and the depositions on file herein.

Respectfully submitted,

/s/ WM. A. BABCOCK,
Attorney for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed March 14, 1955.

[Title of District Court and Cause.]

OPINION

Solomon, Judge:

April 8, 1955

Plaintiff's motion for summary judgment on the issue of liability is denied.

Defendant's motion for summary judgment is hereby granted.

Comment

In two earlier cases, *Lawrey vs. Southern Pacific Company*, Civil No. 6451, and *Barton vs. Southern Pacific Company*, Civil No. 6693, I held that an employee must exhaust his administrative

remedies in an employment contract before he can maintain an action at law for an alleged breach of such contract. In the Barton case, in my unreported opinion, after citing the case of Beck vs. General Insurance Company, 141 Ore. 446, 18 P.2d 579 (1933), I stated:

“I am convinced that the Oregon Supreme Court, in line with its own decisions and the decisions of other courts, would require compliance with the provisions of Rule 38(a) particularly in a case like this, in which it is not contended that the provisions of such rule are either arbitrary or unreasonable.”

Nothing contained in plaintiff's brief has caused me to alter the view which I expressed in the Barton case.

I am also of the opinion that plaintiff was required to comply with the applicable provisions of the collective bargaining agreement entered into between the defendant and the Brotherhood of Railroad Trainmen and that he failed to comply with the provisions of Article 58, Section (c), Item 3. I believe that this conclusion is in line with the holdings of this circuit. *Barker vs. Southern Pacific Co.*, 214 F.2d 918 (1954); see also *George E. Willman vs. Southern Pacific Company*, Civ. No. 5937, U. S. District Court for the Northern District of California, Northern Division, a case decided by Judge Dal M. Lemmon, then a District Judge, on July 22, 1948.

On the basis of my finding that the Oregon law requires the exhaustion of administrative remedies

in an employment contract, the case of Transcontinental & Western Airways, Inc. vs. Koppal, 345 U.S. 653 (1953), is also applicable.

In arriving at these conclusions, I have given serious consideration to the issue raised by the plaintiff that he was not properly notified of the charges being made against him and the time and place of the hearing as required by Article 57 of the agreement. I have also carefully read the letter of Mr. L. P. Hopkins, defendant's superintendent, to Mr. M. S. Felter, secretary of the union that was authorized to represent plaintiff. In Mr. Hopkins' letter of January 12, 1953, in answer to Mr. Felter's letter of January 10, requesting that plaintiff be permitted to return to service and be reinstated with his seniority unimpaired, Mr. Hopkins wrote:

"Regret there is nothing that can be done towards giving favorable consideration to permit Mr. Peoples to return to service of Southern Pacific Company."

The defendant argues that this letter was accepted by plaintiff as a presentation of plaintiff's grievance as required by Article 58, Section (c).

In spite of the fact that the letter of Mr. Hopkins' does not so state, I have come to the conclusion that this letter to Mr. Felter must be given this interpretation and that Mr. Hopkins' letter amounts to a denial of the claim as provided in Item 3, Article 58, Section (c).

[Endorsed]: Filed April 8, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The motion of defendant, Southern Pacific Company, for summary judgment came on regularly to be heard before the undersigned judge of the above-entitled court. Plaintiff appeared by William A. Babcock, of his attorneys. Defendant, Southern Pacific Company, appeared by John Gordon Gearin, of its attorneys, and W. A. Gregory, of counsel. The court having considered the pretrial order, the memorandums of law filed herein, depositions and other pleadings and papers in the cause and being fully advised in the premises, now makes the following

Findings of Fact

I.

At the time of filing of said action, plaintiff was a citizen, resident and inhabitant of the State of Oregon and a non-resident of the State of Delaware. Defendant, Southern Pacific Company, was a Delaware corporation duly authorized to do business in the State of Oregon.

II.

The present action is one of a civil nature and the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

III.

On December 16, 1939, defendant entered into a written collective bargaining agreement with the Brotherhood of Railroad Trainmen as the duly des-

ignated collective bargaining representative of certain of its employees in the class or craft of **trainmen**, including employees in the position of brakeman.

IV.

On July 21, 1947, plaintiff was hired in the State of Oregon by defendant as brakeman and remained in its employ in that position until November 24, 1952. During this period of time, plaintiff was employed within the craft or class covered by the aforementioned collective bargaining agreement and subject to the terms and provisions thereof. This is a civil action at law for breach of this contract, in which plaintiff claims that his employment by defendant was terminated by the latter in violation of the provisions of said collective bargaining agreement.

V.

On November 24, 1952, plaintiff was dismissed by defendant from the service of the latter, for violation of Rule 810 of the Transportation Department, which prohibits employees from leaving or remaining away from their employment without proper authority.

VI.

Article 58 of the applicable collective bargaining agreement, entitled "Limitation in Presenting Grievances", prescribes the steps which must be taken, and the time limitations governing each step, if the employee desires to challenge any action taken by the employer (defendant) with respect to his employment.

VII.

Plaintiff, on January 10, 1953, through his authorized representative, presented a written grievance claim to Superintendent L. P. Hopkins, plaintiff's superior officer, challenging the validity of his dismissal. This was accepted as compliance with Article 58, Section (c), Item 3, since the grievance was filed within the initial 90-day period next following his dismissal. On January 12, 1953, Superintendent Hopkins wrote to plaintiff's representative, declining plaintiff's claim, in accordance with Item 3.

VIII.

Article 58, Section (c), Item 3, of the aforesaid applicable agreement provides:

"Item 3. If grievance is filed within the 90-day limit, as provided in Item 2, and the claim is again declined, the employe, or his representative, shall have 90 days from the date of the latest decision of the Superintendent to advise the Superintendent in writing of intention to appeal to higher officer. If such notice of appeal in writing is not given the Superintendent within the required 90-day limit, the claim will be deemed to have been abandoned. General Chairman of the Brotherhood of Railroad Trainmen will be furnished copy of decision rendered on appeal."

IX.

From and after January 12, 1953, the date on which Superintendent Hopkins declined plaintiff's claim, no notice of intention to appeal to a higher

officer was given to the Superintendent in writing within 90 days, or at any time.

X.

Plaintiff did not comply with the grievance procedure, including the time limitations, set forth in the contract between defendant and the Brotherhood of Railroad Trainmen.

Conclusions of Law

I.

This Court has jurisdiction of the subject matter of this action and of the parties thereto.

II.

Plaintiff's employment with defendant was governed by the terms of the collective bargaining agreement between defendant and its brakemen (trainmen) represented by the Brotherhood of Railroad Trainmen, effective December 16, 1939.

III.

Plaintiff cannot recover under the applicable collective bargaining agreement, because of his complete failure to comply with the successive steps set out in the agreement, which said steps were essential conditions precedent to the creation and maintenance of his cause of action.

IV.

There is no genuine issue as to any fact or facts material to defendant's motion for summary judgment.

ment in its favor. Defendant is entitled as matter of law to judgment herein against plaintiff, with costs.

Dated at Portland, Oregon, this 22 day of April,
1955.

/s/ GUS J. SOLOMON,
Judge

Acknowledgment of Service attached.

[Endorsed]: Filed April 22, 1955.

In the United States District Court for the
District of Oregon

Civil No. 7558

GEORGE PEOPLES, Plaintiff,
vs.

SOUTHERN PACIFIC COMPANY, a corpora-
tion, Defendant.

JUDGMENT ORDER

The above entitled cause having come on regularly for pretrial conference and for hearing upon the plaintiff's motion for summary judgment on the issue of liability and the defendant's motion for summary judgment, the same having been argued for the respective parties and the court having considered the pretrial order, the memorandums filed, the depositions and other papers and pleadings in the cause and after deliberating and having heretofore filed and entered its opinion, findings of

fact and conclusions of law in favor of defendant, it is hereby

Ordered that plaintiff's motion for summary judgment be and the same hereby is denied in its entirety, and it is further

Ordered that defendant's motion for summary judgment be and the same is hereby granted in its entirety, and it is further

Ordered that defendant be and it hereby is granted judgment against the plaintiff.

Dated at Portland, Oregon, this 22nd day of April, 1955.

/s/ GUS J. SOLOMON,
Judge

[Endorsed]: Filed April 22, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that George Peoples, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment Order entered in this action on April 22, 1955.

/s/ WM. A. BABCOCK,
Attorney for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed May 20, 1955.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas George Peoples the plaintiff in the above entitled Court and cause, appeals to the Circuit Court of Appeals, Ninth Circuit, from that certain Judgment Order rendered and entered in the above entitled Court and cause on April 22, 1955, in favor of the defendant Southern Pacific Company, a corporation, against the plaintiff George Peoples,

Now, Therefore, the undersigned, General Casualty Company of America, a corporation, organized and existing under the laws of the State of Washington, and duly authorized to transact surety business in the State of Oregon, as surety, does hereby undertake and promise on the part of said plaintiff and appellant to pay the costs of appeal in the amount of \$250.00 if the appeal is dismissed or the judgment affirmed and such costs as the Appellate Court may award if the judgment is modified.

In Witness Whereof, the said surety has caused these presents to be duly executed by its authorized officers and its corporate seal to be hereunder affixed this 20th day of May, 1955.

GENERAL CASUALTY COMPANY
OF AMERICA,

/s/ By LILLIAN H. ABEL, Attorney in Fact

Co-signed at Portland, Oregon, this 20th day of May, 1955.

[Seal] /s/ D. M. MARSTENS, Resident Agent

[Endorsed]: Filed May 20, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure the plaintiff-appellant hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit taken by Notice of Appeal filed May 20, 1955, the following portions of the record, proceedings and evidence of this action:

1. Pre-Trial Order.
2. Interrogatories.
3. Answers to Interrogatories.
4. Answers to Interrogatories.
5. Motion (of defendant for summary judgment)
6. Motion (of plaintiff for summary judgment).
7. Findings of Fact and Conclusions of Law.
8. Judgment Order.
9. Notice of Appeal.
10. This designation and journal entries.
11. Statement of Points on Appeal.

Dated this 24 day of May, 1955.

BABCOCK, RUSSELL & McGEORGE
/s/ WM. A. BABCOCK,
Attorneys for Plaintiff-Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed May 24, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 75(d) plaintiff-appellant files his statement of points upon which he intends to rely on the appeal in the above matter:

1. The Court erred in granting defendant's motion for summary judgment and in granting judgment against the plaintiff and in favor of the defendant.

2. The Court erred in denying plaintiff's motion for summary judgment.

3. The Court erred in entering its findings of facts numbered V, VI, VII, VIII, IX and X.

4. The Court erred in entering its conclusions of law numbered II, III and IV.

5. The Court erred in failing to enter findings of fact that:

(a) The plaintiff had a contract of employment with the defendant, which included the terms and conditions of the collective bargaining agreement between defendant and the Brotherhood of Railroad Trainmen. Under the terms of this contract of employment and the collective bargaining agreement plaintiff had seniority rights as a brakeman in the Portland division of defendant's operations which entitled him to employment as a brakeman to the extent that work was available and in order of seniority until he quit his employment or his services were validly terminated.

(b) Under the terms of plaintiff's contract of employment he could not be validly discharged ex-

cept in accordance with Article 57, Subparagraphs (b), (c), (d) and (e) of the collective bargaining agreement and could not be discharged without a fair and impartial formal investigation after written notice to the plaintiff of the specific charges against him and of the time and place of the investigation and he had the right to be present and to be represented at the investigation.

(c) The plaintiff was discharged on November 24, 1952, without being given written or any notice of the specific charge against him or of the time and place of the investigation and he was discharged without a fair and impartial investigation and without the opportunity to be present or represented.

(d) Plaintiff was damaged as the result of being discharged by the defendant. The amount of plaintiff's damage consists of the amount of earnings he has lost to date less the amount he did earn or could have earned by the use of reasonable diligence and the present value of the amount he probably would have earned as an employee of the defendant from date until age 65, less the amount he probably would earn or could have earned by the use of reasonable diligence during such period.

6. The Court erred in failing to enter conclusions of law that:

(a) The action on the part of the defendant in discharging plaintiff was a breach of its contract of employment with plaintiff and also a breach of such a character that it excused any further performance of the contract of employment on the part of plaintiff.

(b) Plaintiff has fully performed all terms and conditions of his contract of employment on his part to be performed.

(c) Article 57, subparagraph (a) of the collective bargaining agreement by its terms provides for a voluntary procedure on the part of employees and does not require that an employee who is discharged use such a procedure. In any event, plaintiff has fully complied with this procedure.

(d) Article 58 of the collective bargaining agreement is to be construed with Article 57, subparagraph (a) of the agreement and by its terms provides for a voluntary procedure and does not require an employee who has been discharged to use such procedure in order to maintain an action for damages.

(e) Because of the nature of the breach of the contract by the defendant the plaintiff was excused from using any of the grievance procedures provided for in the agreement even if such procedures were mandatory in their terms and applicable to plaintiff's case.

(f) The grievance procedures in Article 58 of the agreement contemplate proceedings before the National Railroad Adjustment Board and are preliminary to such procedures only and not preliminary to or prerequisites for an independent action for damages for breach of the contract of employment.

(g) The plaintiff under applicable law as a result of his discharge by the defendant had the election

of treating his contract as terminated and his discharge as a breach thereof, or of treating his discharge as void and seeking enforcement of the contract through the grievance procedures of the collective bargaining agreement and the administrative procedures of the National Railroad Adjustment Board. Plaintiff elected to treat his discharge as an effective breach of the contract and to seek his remedy in damages against the defendant.

(h) The action which has been taken by the plaintiff and on his behalf does not amount to an election on the part of the plaintiff to resort to the administrative procedures of the National Railroad Adjustment Board which precludes his recovery of damages in an independent action.

(i) The defendant is not in any way excused from its failure to give plaintiff notice of the charges against him and the time and place of its investigation and affording him a fair and impartial investigation.

(j) The present action does not involve the issue of whether defendant had cause to discharge the plaintiff or whether plaintiff could have been justly discharged had the defendant complied with the provisions of plaintiff's contract of employment in effecting such discharge.

(k) The plaintiff is entitled to a judgment against the defendant for damages for breach of his contract of employment by the defendant. The amount of the damages to be determined by a trial on this issue alone before the Court and a jury.

Dated this 24 day of May, 1955.

BABCOCK, RUSSELL & McGEORGE
/s/ WM. A. BABCOCK,
Attorneys for Plaintiff-Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed May 24, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk, United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Order setting for pre-trial conference; Interrogatories to defendant; Answers to interrogatories; Order setting for pre-trial conference; Answers to interrogatories; Order setting for pre-trial conference; Order re-setting for pre-trial conference and argument on summary judgment; Motion of defendant for summary judgment; Record of hearing on summary judgment; Pre-trial order; Motion of plaintiff for summary judgment; Opinion; Court directs that opinion be filed; Findings of fact and conclusions of law; Judgment order; Notice of appeal; Undertaking for costs on appeal; Designation of contents of record on appeal; Statement of points on appeal; and Transcript of docket entries, constitute the record on appeal from a judgment of

said court in a cause therein numbered Civil 7558, in which George Peoples is the plaintiff and appellant and Southern Pacific Company, a corporation is the defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal is \$5.00, and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 22nd day of June, 1955.

[Seal] F. L. BUCK, Acting Clerk
/s/ By THORA LUND, Deputy

[Endorsed]: No. 14799. United States Court of Appeals for the Ninth Circuit. George Peoples, Appellant, vs. Southern Pacific Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: June 23, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14799

GEORGE PEOPLES,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corpora-
tion, Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD ON APPEAL

Pursuant to Rule 17 (6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit appellant ratifies and adopts as a statement of points to be relied on in the within appeal the statement of points filed by the appellant in the court below and appellant designates for inclusion in the record on appeal the following matters for printing:

1. Pre-trial Order.
2. Motion (of Defendant for Summary Judgment).
3. Motion (of Plaintiff for Summary Judgment).
4. Findings of Fact and Conclusions of Law.
5. Judgment Order.
6. Notice of Appeal.
7. Designation of Points of Record on Appeal (filed in the court below).

8. Statement of Points on Appeal (filed in the court below).

9. This Designation and Statement of Points.

Dated this 28th day of June, 1955.

BABCOCK, RUSSELL & McGEORGE
/s/ WM. A. BABCOCK,
Attorneys for Appellant

Certificate of Service attached.

[Endorsed]: Filed June 29, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEE'S DESIGNATION FOR PRINT-
ING ADDITIONAL PART OF RECORD

Pursuant to Rule 75(1) F.R.C.P. and to Rule 19 of this Court, appellee herewith designates for printing the following additional part of the record on appeal herein:

1. Opinion of Solomon, District Judge, of April 8, 1955.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Appellee

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 8, 1955. Paul P. O'Brien,
Clerk.

